TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No 212 80

THE MIDWAY COMPANY, PLAINTIFF IN ERROR,

vs.

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN, AND MARGARETHA LONSTORF.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED JUNE 11, 1900.

(17,797.)

(17,797.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 312.

THE MIDWAY COMPANY, PLAINTIFF IN ERROR,

vs.

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN, AND MARGARETHA LONSTORF.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

	Page.
Transcript from district court of St. Louis county	1
Summons	1
Complaint	2
Answer of Merritt, Clark, and Fagan	4
Note as to answer of Eaton (for this answer see side page 307)	33
Reply to answer of Merritt, Clark, and Fagan	34
Reply to answer of Eaton	40
Stipulation to make new party defendants, &c.	47
Order making Margaretha Lonstorf party defendant	50
Findings of fact	51
Conclusions of law	60
Exhibit A—Decision of Secretary of Interior in Hyde & McDonald *vs.* Eaton & Stram, February 18, 1889	63
B—Deed between Orillie Stram and husband and Frank W. Eaton, March 31, 1886	81
Memorandum opinion	86
Stipulation as to further findings, &c.	94

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 1, 1901.

Page.
Stipulation as to settled case 95
Settled case 96
Testimony and record of proceedings had at the trial 96
Note as to Exhibit A (for Exhibit A see page 63 and side page 330). 106
Exhibit B—Certificate of Commissioner of General Land Office 107
Testimony of Frank W. Eaton 108
Testimony of Edward Byrne 117
Diagram of township 63, range No. 11 west, 4th principal meridian .. 129
Affidavit of Frank W. Eaton, June 16, 1883 129
Scrip certificate No. 19 D 131
Application of Orillie Stram 131
Register's and receiver's certificate, June 16, 1883 132
Affidavit of Richard Fagan 132
Scrip certificate No. 19 D 133
Application of Orillie Moreau 133
Register's and receiver's certificate, July 21, 1885 134
Diagram of township No. 63, range No. 11 west, 4th principal meridian 137
Affidavit of Richard Fagan 137
Frank W. Eaton 138
Richard Fagan 139
Scrip certificate No. 19 E 140
Application of Orillie Stram 141
Certificate of register and receiver, June 16, 1883 141
Scrip certificate No. 19 E 142
Application of Orillie Stram 142
Certificate of register and receiver, July 21, 1885 143
Affidavit of Edward Byrne, James H. Powers, and Joseph Clement. 145
Deed from Orillie Stram and husband to Frank W. Eaton, March 31, 1886 146
United States patent to Frank Hicks 153
Deed from Frank Hicks *et ux.* to the Midway Company, October 21, 1897 155
Receiver's receipt, July 21, 1885 157
Deed from Orillie Stram and husband to Frank W. Eaton, October 30, 1885 157
Exhibit 1—Certificate of Commissioner of General Land Office to papers in case of Hyde *vs.* Eaton 160
Exhibit A—Letter, Jac Raffauf to White and Reynolds, April 1, 1886 161
B—Declaratory statement of James Henry Power 161
C—Affidavit of Edward Byrne, James H. Powers, and Joseph Clement 162
D—Affidavit of James H. Powers 163
F—Proceedings in matter of application of Orillie Stram to locate scrip No. 19, letter D 166
Proceedings in matter of application of Orillie Stram to locate scrip No. 19, letter E 175
G—Deed from Orillie Stram and husband to Frank W. Eaton, March 31, 1886 183

Page

Exhibit H—Warranty deed and confirmation, Orillie Stram and husband to Frank W. Eaton, May 25, 1883 188
I—Power of attorney to Leonidas Merritt, May 25, 1883 192
J—Certificate of register of deeds 196
Exhibit 2—Certified evidence from the Department of the Interior.. 197
Secretary's certificate 197
Record of hearing 197
Testimony of James H. Power 199
Thomas W. Hyde 219
Angus McDonald 222
George R. Stuntz 226
Jewett McPherson 228
Emil Hartmann 229
S. F. White 231
Frank W. Eaton 232
Edward Byrne 240
Richard H. Fagan 251
James H. Finn 259
Angus McDonald (recalled) 261
Thos. W. Hyde (recalled) 264
Exhibits offered 267
Receipts of register and receiver 268
Deed, Orilie Stram to F. W. Eaton, October 30, 1885 269
Judge's certificate to settled case 272
Notice of motion for new trial 273
Order denying motion for new trial 274
Further opinion 275
Judgment 302
Notice of appeal 305
Answer of Frank W. Eaton 307
Exhibit A—Decision of Secretary of the Interior in Hyde & McDonald rs. Eaton & Stram, February 18, 1889 320
Syllabus 330
Opinion 331
Judgment 341
Order for judgment 342
Minutes of argument 342
Clerk's certificate 343
Petition for writ of error 344
Order allowing writ of error 345
Writ of error 345
Citation and service 346
Bond on writ of error 348
Assignment of errors in Supreme Court of the United States 350
Assignment of errors in supreme court of Minnesota 351
Stipulation in regard to printing record 353

STATE OF MINNESOTA.

Supreme Court

APRIL TERM, 1900.

STATE OF MINNESOTA, COUNTY OF ST. Louis. District Court, Eleventh Judicial District.

THE MIDWAY COMPANY, Plaintiff,

vs.

FRANK W. EATON, LEONIDAS MERRITT, RICHARD H. FAGAN AND MERRILL M. CLARK, Defendants.

SUMMONS.

The State of Minnesota to the above Named Defendants:

You are hereby summoned and required to answer the complaint of the plaintiff in the above

entitled action, of which a copy is hereunto annexed and herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber at his office in the First National Bank Building, in the City of Duluth, in said County, within twenty days after the service of this summons upon you, exclusive of the day of
4 such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated this first day of April, A. D. 1899.

WALTER AYERS,
Plaintiff's Attorney,
308-9 First National Bank Building,
Duluth, Minnesota.

5 P. H. SEYMOUR,
Of Counsel.

STATE OF MINNESOTA, COUNTY OF ST. Louis. District Court, Eleventh Judicial District.

THE MIDWAY COMPANY, Plaintiff,

vs.

6 FRANK W. EATON, LEONIDAS MERRITT, RICHARD H. FAGAN, AND MERRILL M. CLARK, Defendants.

COMPLAINT.

Plaintiff for its complaint herein alleges:

1. That the plaintiff is a corporation duly organized and doing business under the laws of the State of Minnesota.

2. That the plaintiff is the owner of and is now in the actual possession of the following described lands situate in the State of Minnesota, to-wit: Lots three (3), five (5) and six (6) of Section thirty (30), in Township sixty-three (63) North of Range eleven (11) West of the Fourth Principal Meridian.

3. That all of said lands are situate in the County of St. Louis and State of Minnesota.

4. That each of the defendants severally, wrongfully and unlawfully claim some estate or interest in the said lands and all of them, or lien upon the same, adversely to the plaintiff, all of which claims are unfounded in law or in fact.

5. Wherefore, plaintiff demands judgment adjudging it to be the owner in fee to the lands above described and adjudging that none of the defendants have any interest or estate therein or any lien thereon and perpetually restraining each of the defendants from asserting or enforcing any claim to, any interest, estate or lien in, to or upon said lands or any part thereof, and for the costs and disbursements of this action.

WALTER AYERS,
Attorney for Plaintiff,
308-9 First Nat'l Bank Bldg., Duluth, Minn.

P. H. SEYMOUR, of Counsel.

STATE OF MINNESOTA, COUNTY OF ST. Louis. District Court, Eleventh Judicial District.

THE MIDWAY COMPANY, Plaintiff,

vs.

FRANK W. EATON, LEONIDAS MERRITT, RICHARD H. FAGAN AND MERRILL M. CLARK, Defendants.

Now come the above named defendants, Leonidas Merritt, Merrill M. Clark and Richard H. Fagan, and answering the complaint of the plaintiff herein, deny each and every allegation, matter and thing in said complaint contained, save and except as the same is hereinafter admitted, qualified or explained.

I.

1. These defendants deny that the plaintiff is the owner of the lands described in the complaint, or any part thereof, or has any right, title or interest in the same, and deny that the plaintiff is in the possession of the same or any part thereof.

2. They admit that the lands described in said complaint are in the County of St. Louis and State of Minnesota.

3. The defendants Merrill M. Clark and Richard H. Fagan admit that they claim an interest in the lands described in the said complaint and they allege the fact to be that the said lands are owned by the persons named below and in the proportions herein set forth.

Frank W. Eaton an undivided thirteen thirty-sixths interest, Merrill M. Clark an undivided nine thirty-sixth interest, Margaretha Lonstorf an undivided eight thirty-sixth interest, and Richard H. Fagan an undivided six thirty-sixth interest.

4. These defendants allege that they jointly, with the other owners of undivided interest as hereinbefore set forth, have been in possession of said lands, and all thereof, for about fourteen years last passed, through their agents and tenants, who under their authority and direction, have been in the actual occupation of said lands during said time and were so at the time of the commencement of this action.

II.

5. These defendants further answering said complaint, both by way of defense and for affirmative relief, allege the foundation and basis of their right and title to said premises, described in said complaint, to be as follows, to-wit: That on the 17th day of July, 1854, the Congress of the United States passed an Act entitled, "An Act to Authorize the President of the United States to cause to be surveyed a tract of land in the Territory of Minnesota belonging to the half-breeds and mixed bloods of the Dacotah or Sioux nation of Indians, and for other purposes," by which Act the President of the United States was and became authorized to exchange with the half-breeds and mixed bloods of the Dacotah or Sioux nation of Indians, who were entitled to an interest therein for the tract of land lying on the west side of Lake Pepin and the Mississippi River in the then territory of Minnesota, which had been theretofore set apart and granted for their use

and benefit by the Ninth Article of the treaty of Prairie du Chien on the 15th day of July, 1830, and for that purpose by the said Act, the President of the United States was authorized to cause to be issued to the said persons, on the execution by them or by the legal representatives of
16 such as were minors, of a full and complete relinquishment to the United States of all their right, title and interest according to such form as should be subscribed by the Commissioner of the General Land Office in and to the said tract of land or reservation, certificates or scrip of the amount to which each individual would be entitled of said land or reservation, pro rata among the claimants, which said certificates or scrip, it was by said Act provided, might be located upon
17 any of the said lands within said reservation not then occupied by actual bona fide settlers of the half-breeds or mixed bloods, or such other persons as had gone into said territory by authority of law, or upon any other unoccupied lands of the United States subject to preemption or private sale, or upon any other surveyed lands not reserved by government, upon which they should respectively make improvements. It being further provided in said Act that said certificates or scrip
18 should not embrace more than 640 nor less than 40 acres each and that the same should be equally apportioned, as nearly as practicable among those entitled to an interest in said reservation. That it was further provided in and by the terms of this Act, that the President be and was authorized to cause to be ascertained the number of the half-breeds and mixed bloods who were entitled to participate in said grant or reservation, and to issue the scrip or certificates provided for in said

Act. That the said Act of Congress was approved July 17th, 1854, and became in force on and after said date, and the same is codified and published in the Tenth volume of the United States Statutes at Large on page 304 and is hereby made a part of this complaint as fully and in all respects as though the same were set forth here in haec verbae. 19

6. That pursuant to the provisions of said Act, the President of the United States caused the number and names of the said half-breeds and mixed bloods who were entitled to participate in the benefits of said grant or reservation to be ascertained; and the said persons so entitled to the benefits thereof duly executed a full and complete relinquishment to the United States, of all right, title and interest in the manner prescribed by the 20 Commissioner of the General Land Office, in or to said tract of land or reservation, and the said tract of land or reservation thereby became fully relinquished to the United States government which proceeded to open up the same for disposition and settlement, in accordance with the public land laws of the United States.

7. That in consideration of said relinquishment to the United States by the said persons entitled to the benefits of said reservation, of the 21 said lands or reservation, and of all their right, title and interest therein to the said United States, pursuant to the provisions of the said Act, and in manner and form prescribed by the Land Department of the United States, the President of the United States caused to be issued to the several parties entitled to the benefits of said Act, certificates or scrip for the same amount of land for which each of such individuals were found to be

entitled in case of a division of said grant or reservation, which said certificates or scrip were, under the provisions of said Act, locatable upon any of the lands within said reservation not then occupied by actual settlers of the classes mentioned in this Act, or upon any other unoccupied lands of the United States, subject to preemption or
22 private sale, or upon any other unsurveyed lands not reserved by the government, upon which they should have respectively made improvements.

8. That one of the persons entitled to benefits of said Act, and entitled to the benefits of said reservation, and who joined with others of her nation in surrendering to the United States said reservation, and who executed due and proper relinquishment thereof, was one Orillie Moreau, a
23 half-breed of the said nation, who afterwards intermarried with one Roman Stram.

9. And that under and by virtue of the said Act of Congress, and of the interest and rights which the said Orillie Moreau had in said reservation and lands at the time said Act became in force, the said Orillie Moreau was and became entitled to certificates or scrip, under the provisions of said Act, entitling her to have and take instead of the rights which she surrendered in
24 and to said reservation, at least three hundred and twenty acres of government land of the classes mentioned and specified in said Act, and that on or about the 23rd day of November, 1856, certificates or scrip, such as are provided for in and by the terms of said Act duly issued to said Orillie Moreau, numbered 19E and 19D, entitling the said Orillie Moreau to take, have and reserve of the public lands of the United States, of the classes mentioned in said Act, three hundred and twenty

acres of such lands, each of said certificates being for one hundred and sixty acres.

10. That thereafter and on the 16th day of June, A. D. 1883, the said Orillie Moreau, then Orillie Stram, never having theretofore made use of the said certificates or scrip, and the same never having in any manner been extinguished or satisfied, through the defendant Frank W. Eaton, (who had theretofore been by her duly empowered as her attorney in fact for that purpose) presented the said scrip at the local land office in Duluth, Minnesota, and then and there made application to locate the same on certain unsurveyed lands of the United States, in the said land district in which the said land office was located, and did enter and take said land under and by virtue of said scrip, the lands for which said application was made, as aforesaid, was in said application described by metes and bounds as follows: Starting at the quarter post on the east line of Section 25, Township 63 North of Range 12, West, and thence running east 240 rods for a place of beginning; thence south 80 rods, thence east 80 rods, thence north 80 rods, thence east 80 rods, thence north 160 rods,thence west 80 rods, thence south 80 rods, thence west 80 rods, thence south 80 rods, to the place of beginning, the same being located under scrip number 19E. Also commencing at the quarter post on the east line of Section 25 in Township 63 North of Range 12 West; running thence north on said section line 80 rods, thence east 80 rods, thence north 80 rods, thence east 80 rods, thence south 80 rods, thence east 80 rods, thence south 80 rods, thence west 240 rods to the place of beginning. The same being located under scrip 19D, each of said locations embracing 160

acres of land, the same not being lands reserved by the government of the United States for *any* purpose whatsoever. The said scrip and the said application to locate said lands thereunder, being then and on that day filed in the said local land office at said Duluth, Minnesota, together with a diagram or plat of said lands so located, embracing therein such descriptions thereof as were sufficient to duly and properly designate the same; and that prior to the location of said scrip upon said land as above stated, substantial improvements had been made thereon by and under the authority of and for the benefit of the said Orillie Stram; that the said Orillie Stram in all respects complied with the said Act of Congress, and with the methods, rules and regulations prescribed by the Land Department of the United States, for the location and entry of such lands under such scrip.

11. That thereafter, on or about the 20th day of July, 1885, said lands having been duly surveyed and platted, the plat and survey of said Township and of the said lands, made by and under the authority of the government of the United States, was duly filed in the local land office at said Duluth, Minnesota, and thereupon and on the 21st day of July, 1885, upon application of the said Orillie Stram, acting by and through her duly constituted attorney in fact, said certificate of Sioux half-breed scrip number 19D was adjusted to lots three (3), five (5), and six (6), and the southeast quarter of the northwest quarter of Section 30, Township 63 North of Range 11, West; said certificates of Sioux half-breed scrip number 19E was adjusted upon lots one (1), and two (2) and the southwest quarter of the northeast

quarter and the northwest quarter of the south-
east quarter of Section 30, Township 63 North of
Range 11, West, being the same lands hereinbe-
fore described by metes and bounds, and then and
there and on that day said certificates or scrip
was duly located upon said surveyed
lands as above described, and the
said lands as surveyed lands were 31
duly taken, entered and appropriated under and
by virtue of said certificates or scrip. That both
on the 16th day of June, 1883, as hereinbefore set
forth, when the said scrip or certificates were filed
and located upon the said lands as unsurveyed
lands, and on the 21st day of July, 1885, when
they were adjusted to and located upon said lands
as surveyed lands, the entry and location thereof
and the application to locate said scrip thereon 32
were duly and properly allowed by the local land
officers at said Duluth, Minnesota, there being
on neither of said dates, or at any time previous
thereto, nor at any other time, any valid, adverse
claims to said lands, or any intervening rights of
any other persons whomsoever thereto, and said
lands being at said time, except under and by
virtue of said certificates or scrip, unappropriated
governments lands of the United States and of the
class mentioned and set forth in the said Act of
Congress subject to location under said scrip or 33
certificates, and on the last named date, towit, July
21st, 1885, Receivers' receipts and certificates of
entry and filing and of the allowance of said appli-
cation and the location of said scrip thereon, were
duly and regularly issued and delivered at the
local land office of said Duluth, Minnesota, to the
said Orillie Stram, which were thereupon duly
recorded in the office of the Register of Deeds in

the county in which said lands was located, and have ever since remained of record therein.

12. And these defendants allege the fact to be that thereupon said scrip or certificates became satisfied and the obligations of the United States, in consideration of the surrender by said
34 Orillie Moreau of her interest in said reservation, became discharged, and the said lands taken and located upon said scrip or certificates, hereinbefore described, became from the first of said dates of entry and location segregated from the public domain and became henceforth the property and estate of the said Orillie Stram, and those claiming by, through and under her, without regard whatsoever to the issuance of any patent in form therefor by the government of the United States.

35 13. That through sundry mesne conveyances these defendants, Merrill M. Clark, and Richard H. Fagan have become owners of an undivided one-fourth and an undivided one-sixth interest, respectively, in and to said lands and have succeeded to the ownership of the said undivided interests as aforesaid, of all the right, title and interest which the said Orillie Stram (formerly Orillie Moreau) at any time had in and to said lands and that the land described in the complaint is a
36 part and portion of the said lands.

14. That about the time of the adjustment of the said scrip to the said surveyed lands and of the appropriation of the said lands as surveyed lands, to the satisfaction and extinguishment of said scrip, one Thomas Hyde made an application to make a preemption filing upon lots five (5) and six (6) and the southwest quarter of the northwest quarter of said Section, which application was denied by the local land officers at said Du-

luth, Minnesota, and on or about the same time one Angus McDonald made a like application on lot two (2) and the north half of the southeast quarter and the southwest quarter of the northeast quarter of said section, which application was also denied by the said local land officers at said Duluth, Minnesota, both on the grounds that 37
the said lands had already been appropriated by the location of said scrip hereon, and also that the applications of said Hyde and McDonald were not made in good faith but were made in fraud and in violation of the preemption laws of the United States, and were affected by a fraudulent and unlawful intent, rendering the same invalid, and that it was duly and properly determined by the local land officers and sustained by Departmental decision, that neither the said Hyde nor 38
the said McDonald ever had or obtained any rights whatsoever in or to the said lands by virtue of said preemption filings or by virtue of any subsequent proceedings on the part of said Hyde or McDonald, or either of them, to obtain said lands, and that said preemption filings were void and invalid and contrary to the laws of the United States, and that they, said Hyde and McDonald thereby obtained no preference right of entry, or any rights of any character in and to said lands, or any part thereof; but that notwithstanding 39
the same, the said Hyde and McDonald made an attack upon the Land Department of the United States in or about the month of November, 1885, upon said location of the said scrip or certificates of the said Orillie Stram upon said lands and of the entry of the said lands thereunder, charging that the said Orillie Stram had never made any improvements whatsoever upon said lands, either

in person or by agent or attorney and that the same, at the time of the said first filing thereof, as hereinbefore set forth, were unsurveyed lands, and could be located only after such improvements had been made, and supported the same by an affidavit which had by misrepresentation been
40 obtained from the said Orillie Stram, in which she denied giving said power to said Eaton, or any authority to locate the scrip or erect buildings or make improvements on the lands in controversy or any land for her use and benefit, and that such charges on the part of said Hyde and McDonald culminated in a hearing thereon in the local land office at said Duluth, Minnesota, on the 6th day of April, 1886, resulting in a decision of the said land office sustaining the said scrip locations, in
41 which decision the said local land officers held, among other things:

That the scrip in question was located upon unsurveyed lands on June 16th, 1883, more than one year before the preemptors, Hyde and McDonald settled, and was adjusted to the surveys July 21st, 1885.

That the record contained duly executed powers of attorney from the scripee and her husband to Frank W. Eaton, giving him full power to
42 do all acts necessary to effect and secure permanent bona fide locations of the scrip.

That Eaton, under said authority, employed another to go upon the land and make suitable improvements, giving directions what improvements to make and how to make them, which improvements were made for Eaton and for the purposes claimed by him.

That the said scripee, while stating in said affidavit that she did not know Eaton and never

authorized him to make improvements on the lands, did not appear at the hearing to testify in support of the charges made, and that she never asked that the location be cancelled and that the scrip be returned to her, but on the contrary, between the date of said affidavit and the day of the hearing, executed and delivered a deed of confirmation, acknowledging, ratifying and 43
confirming all that she had done by Eaton as her attorney.

And further decided that there was nothing in the evidence to show that the scripee was misled or imposed upon by the said Eaton or his agents, nor to controvert the fact that the said scrip locations were affected in conformity with the usual and accepted practice in such cases, and in accordance with the law and the rules of the 44
Land Department, and held that the contestants had failed to make out a case and that the scrip location should stand.

From that decision contestants Hyde and McDonald appealed to the General Land Office, assigning six specifications of error, among others, that the local land officers had treated the case as if the controversy was between the scripee and her attorney in fact, whereas it grew out of a contest between third parties, between said Hyde and 45
McDonald, who claimed to have shown that the scrip was fraudulent on the part of the scripee and her grantees and that the local land officers had failed to pass upon the question whether the land contained improvements made by or under the personal supervision or direction of the scripee and for her personal use and benefit, and erred in finding that a confirmatory deed made between

two of the parties could bar the right of subsequent bona fide applications.

Pending said proceedings on appeal, other parties made application to contest the said scrip locations and also to contest the preemption claims of said Hyde and McDonald, which, under
46 the instructions of the Commissioner of the General Land Office in August, 1887, were held subject to the final disposition of said appeal.

That upon said appeal the Commissioner of the General Land Office made his decision and found that accompanying the scrip and applications to locate the same, were two original powers of attorney given May 25th, 1883, by the scripee and her husband to Frank W. Eaton, and that with each application was an affidavit by said
47 Eaton setting out that under said powers of attorney he had caused to be built upon each of the said tracts upon which scrip was located, a house fourteen by sixteen feet, one story high, of timber covered with split shingles with door and windows; that he had also cleared half an acre of each tract and that said improvements were made under the personal direction of said scripee and for her personal use and benefit, and further decided that in the record there was an original
48 power of attorney given by the said scripee and her husband to Leonidas Merritt, granting him full power and authority to enter upon and take possession of any and all pieces and parcels of land in the State of Minnesota which they then owned or might thereatfer acquire or become interested in under and by virtue of the location of the scrip in question and prosecute and defend any suit at law in the courts of said state, and to grant, bargain, sell, dismiss, lease, convey and

confirm said lands, or any part thereof by deed, conveyance, demise or lease, in the same manner as if performed by them individually;

And further decided that in the record were certified copies of warranty deeds, dated July 2nd, 1883, executed by said Leonidas Merritt in the name of the said scripee and her husband, under 49
and by virtue of the power of attorney above mentioned, conveying to Edward Byrns, Joseph A. Powers and Joseph Clement an undivided one-third interest in and to the lands embraced in said scrip locations involved in said controversy, the consideration named in said deed being $25,000 also certified copies of two warranty deeds, dated July 6th, 1883, executed in the same manner by the same party, conveying to Frank W. Eaton an undivided two-thirds interest in and to said 50
tract of land, the consideration named in each being $25,000. Also that Joseph Clement one of the grantees of an undivided one-third interest, above mentioned on August 28th, 1883, as appears by certified copies of two deeds of warranty on file, conveyed to one Nicholas Lonstorf his undivided one-ninth interest in and to said tracts, the consideration named being Two Hundred and Fifty Dollars, and that on the next day, August 29th, 1883, as shown by certified copies on file, 51
Joseph Powers, another of the grantees of an undivided one-third interest, executed two similar deeds, conveying to said Lonstorf his undivided one-ninth interest in and to said tracts, the consideration named being Three Hundred and Fifty Dollars in each deed; and also that the record contained quit claim deeds correcting faulty descriptions in said previous deeds, said decision holding that a two-ninths interest under said scrip loca-

tions had by said deeds vested in Nicholas Lonstorf, one-ninth in Edward Byrns and six-ninths in Frank W. Eaton.

The said commissioner further decided that several deeds of conveyance conferred no greater title upon the grantees than the grantors had,
52 which he held was simply a right to these tracts of land, subject to the final adjudication and approval of the locations; said commissioner also in said decision found that prior to the hearing before the local land office, to-wit, on March 31st, 1886, the scripee, Orillie Stram, and her husband joined in a deed of confirmation, ratifying and confirming all and singular the acts of the said Frank W. Eaton and Leonidas Merritt relative to the acts in question done and performed by them,
53 under the respective powers of attorney given as hereinbefore described;

The said commissioner further determined in said decision that the record before him established by a clear preponderance of evidence, the fact that said Eaton, by virtue of his power of attorney, employed Edward Byrns to make the improvements upon the respective tracts in question, and that Byrns procured the services of Powers and Clement to assist him therein; that Eaton
54 admits that the power of attorney under which he acted, was executed by the said scripee in blank and that he had never seen the scripee until March 31st, 1886, that he had not himself seen the land and did not know whether the scripee had seen it or not; that the deed of confirmation of the scripee appears, so far as she and Eaton are concerned, to remove any objections to the acts previously performed by the latter under and by virtue of said power of attorney, and that the

affidavits accompanying the locations of said scrip appear to fulfill the requirements of the circular of May 28th, 1878, as printed in the 5th Copp's Land Owner, 126;

The said commissioner further decided in said decision that the only other question left to pass upon, touching the legality of said scrip locations 55
was whether the power of attorney given by the said scripee to Frank W. Eaton, by virtue of which she made the locations, could carry with it under the law, power and authority to make the improvements necessary as a perquisite to valid location of the scrip on unsurveyed lands, and held that since the evidence showed that the scripee never saw the lands or the improvements, nor had anything to do with the same personally, and since the circular above referred to re- 56
quired that the Indian should have direct connection with the land and claim the same for his or her own personal use, that the scrip locations were not valid and should be cancelled as speculative and made with evident intent to evade the law, rather than comply with the legal requirements.

That an appeal was taken from the General Land Office to the Secretary of the Interior on or about the 4th day of August, 1888, by said 57
Orillie Stram and Frank W. Eaton, her attorney in fact and the said parties in interest, it being assigned as specifications of error on said appeal, among other things, that the said Commissioner of the General Land Office erred in holding and deciding that there was any failure in manner, form or substance on the part of the scripee in locating said scrip numbered 19E and 19D on the tracts of land selected by her, or in making the

improvements required to be placed on unsurveyed lands by the act of Congress approved July 17th, 1854, and in holding that improvements on unsurveyed lands subject to appropriation under said Act, must be made by or under the personal supervision and direction of the scripee, and be for his or her personal use and benefit, and that
58 it must appear that the Indian has direct connection with the tract located and is claiming the same for his own personal use, and in holding the law to be that the performance of conditions necessary to the valid location and satisfaction of the scrip certificates issued in conformity with said Act, may not be lawfully delegated to and done by an agent empowered by and acting for the scripee, and in holding that the adjustment of the lines of the public surveys of a scrip loca-
59 tion theretofore made by an agent of the scripee on unsurveyed lands, though assented to and ratified by the scripee, does not constitute a valid appropriation of the tract, and in not finding and holding that at the time of the adjustment of the scrip to the lines of the public survey, no valid right under the laws of the United States had attached to said land adversely to said scrip, and in not holding that at the date of said adjustment, no right adverse thereto had attached to said
60 land, and said adjustment was in legal contemplation and intent a location on surveyed land, and thence in not requiring improvements as a condition precedent to valid location, and in holding said scrip location for cancellation, and for failure to find and decide the questions in issue, both in law and fact, in favor of the title of the scripee;

That thereafter and on the 18th day of February, 1889, the Hon. William F. Vilas, then Secretary of the Interior of the United States determined said cause on appeal and held that the said scrip locations were valid, which decision was afterwards on the 28th day of January, 1891, confirmed by the Hon. John W. Noble then Secretary of the Interior, it being also determined in 61
the decisions of both Secretaries that neither Hyde nor McDonald nor any person or persons whomsoever, had any right, title or interest in or to said land, or any part thereof or any claim thereon, and that at no time, either intervening between said location of said scrip upon unsurveyed land and the time of the adjustment of said scrip to the same as surveyed land, or at any other time, had any valid rights attached to said lands adverse to said 62
scrip locations, and assumed to determine and decide that the said lands were still public lands of the United States open to entry;

That the said Secretary of the Interior, Mr. Vilas in and by the decision above mentioned, held that the said scrip, being accompanied by two powers of attorney executed in blank, one giving to some one not then named power to locate the scrip and the other giving like authority to sell the lands which might be located thereunder, op- 63
erated as an assignment of the scrip and assumed that the same, after many years passing through different hands, lodged in the hands of Frank W. Eaton, who filled up the blanks in the power of attorney and employed others to make slight improvements on the land, and located the scrip as attorney in fact of said Orillie Stram, the scripee, and that the other power of attorney was filled out in the name of Leonidas Merritt as the attor-

ney in fact who executed the conveyances; that the scripee never saw the land and had not seen Eaton at the time he acted for her, as her attorney in fact and did not know that there was such a person, and assumed the fact that she had sold the scrip long prior to the location and had no
64 personal interest in the land and that the improvements were not made for her personal use and benefit and that her actual interest in the land ceased when she disposed of the scrip, which the said secretary assumed that she did by virtue of said powers;

That said Secretary in said decision found that said Orillie Stram, her husband joining, had ratified what had been done by her said attorney in fact and found, or assumed, that said ratification
65 was for a consideration, and held that such confirmation did not change the fact that the improvements and location although made under the said power of attorney, were not under the direction and in the interest of the said scripee but in the interest of the acquisition of said land and in the interest of those who desired to acquire it through said scrip;

That in the decision of Secretary Noble, above referred to, a case confirming the decision of Sec-
66 retary Noble, the case was not gone into detail, Secretary Noble affirming the position taken by Secretary Vilas and also affirming the position of the last named Secretary that no other parties had acquired any valid, adverse rights whatsoever in and to said premises.

15. That said decisions of the said Secretaries of the Interior rested upon a mistaken and erroneous interpretation and construction of the laws of the United States under which said scrip

locations were made; among others, in this, that the power of attorney under which said Eaton acted as the attorney in fact of said Orillie Stram in making said scrip locations and in filing said scrip and in entering said lands, was in blank in so far as the name of the donee in said power was concerned, when first executed by the said scripee, Orillie Stram, and hence void; that the improvements made upon said lands in connection with the first filing of the first scrip thereon, were not made by the said scripee Orillie Stram in person, or for her personal benefit or enjoyment and that she had no personal connection with said land and hence that the location of said scrip on said land was unlawful and invalid. That prior to the location of said scrip upon said land, that said Orillie Stram had executed a power of attorney, to-wit, to the defendant Leonidas Merritt, to sell and convey the land which might be obtained under the said scrip, and hence that by means of the two powers of attorney, the one to locate and the other to sell, an assignment of the said scrip had been effected contrary to the provisions of the said statute, and hence that all proceedings had under the said power of attorney of the said Eaton to locate the said scrip were invalid; notwithstanding that thereatfer the said Orillie Stram had in all respects confirmed the said acts of the said Eaton as her attorney in fact. That the said Eaton, prior to the location of the said scrip, had not seen the said scripee, Orillie Stram, and did not know whether she had been upon the land personally or not, and hence that the entry and location of the land in her name and under said scrip was invalid. That said decision rested upon an erroneous and unsupported assumption of the fact

67

68

69

that said certificates in the name of Orillie Stram were disposed of by her under the two powers of attorney, the one to locate and the other to sell, and executed by her in blank, which after many years, passing through different hands, lodged in the hands of said Frank W. Eaton, who filled up
70 the power to locate the same with his own name and empowered other persons to make slight improvements on the land, and thereupon located the scrip as the attorney for said Orillie Stram, and afterwards filled, or caused to be filled, the blank in the power of attorney, with the name of the said defendant Leonidas Merritt, and that she, the said Orillie Stram, did not know at the time of he said acts, of said Eaton and that there was such a person as said Eaton in existence. Whereas,
71 in truth and in fact there was nothing in the records of said case, as the same was made before the said secretaries, to justify such conclusions and assumptions of fact; and whereas the same was and is contrary to the actual facts then and there and since existing and appearing in said record, and, whereas said conclusions of law and the interpretations of the law as aforesaid were erroneous, mistaken and wrongful and contrary to the interpretation of said law, as made in numerous decisions of the Land Department and
72 courts of the United States; the true facts being as established in said record without contradiction, that the said Orillie Stram did not make a sale of said scrip or certificates and never made an assignment thereof, and that shortly and a few days before the filing of said scrip upon said lands, and desirous of obtaining lands that she might have the benefit thereof and sell and dispost of the same, after she obtained the same, and

receive the benefit thereof, she executed and delivered said power of attorney under which said Eaton acted in making said locations, and under which he acted in making and causing to be made the improvements upon said lands, which improvements these defendants allege were good and substantial improvements and in all respects satisfied the terms, the letter and spirit of the law, as found by the local land officers, and that they were made for the purpose and to the end that the said lands should be acquired by and in the name of the said Orillie Stram, to be disposed of if she so desired by her or under her authority, after the same should be so obtained. That the said interpretation of the law by the said Secretaries of the Interior, that the said improvements had to be made in person or under the personal direction of or for the personal benefit and enjoyment of the said scripee, Orillie Stram, was erroneous, such law only requiring that as to unsurveyed lands improvements be made, to the end that the same should be a notice to other parties that claims had been made to such lands under such scrip or certificate, to prevent others from innocently entering upon said lands and making settlement thereon in ignorance of the claims of said parties under said locations, and to put all such persons on inquiry, and that in truth and in fact it was and is immaterial whether such improvements were placed upon said lands in person by the said scripee, and that, so long as improvements were made, whether the same were made by said scripee in person, or under her immediate direction, or purchased from others who had relinquished their interest therein, the same in all respects satisfied the demands of said law.

16. Further these defendants allege that it was entirely immaterial whether the name of the donee in the said power of attorney was filled in at the time of the first execution thereof or not, inasmuch as the said power of attorney, as was shown without dispute, was delivered to the said Eaton
76 by the said Orillie Stram, through her agents, for the purpose of making said locations in the name of the said Orillie Stram, from which locations and the sale of the lands thereafter she expected to derive a consideration, and inasmuch as said locations were in fact made in her name, and inasmuch as the said scrip or certificates in the name of the said Orillie Stram, were, by the said Eaton, acting as attorney in fact, duly entered, filed and located said lands. Further, that at the
77 time of location of the said scrip upon said lands on July 21st, 1885, at the time when the same were adjusted to said lands as surveyed lands, the plat of survey of the said Township had been made and filed, and there being at that time no valid adverse claims to said lands or any part thereof, no improvements whatsoever were required in order to render valid the location of said scrip upon said lands. And it should have been by the said secretaries held, as in fact the law is, that such entry and such location of said land was
78 in all respects valid, without regard to any improvements whatsoever, no other interest of any parties whomsoever and no adverse claims by which the said lands in the time intervening between the first filing of the said scrip on said lands as unsurveyed lands and the filing and adjustment thereof upon and to the same on said last named date as surveyed lands.

That it was error, to hold and so construe the law that in case the said Orillie Stram desired to sell and dispose of said lands after they should be obtained in order to derive the benefits from sale to which she was entitled under the said certificates or scrip for which she had thereto paid the United States by the surrender of her rights as aforesaid in and to said reservation, that it was invalid for her to execute a power of attorney, whether in blank or otherwise, to sell the said lands after the same should be thus located, even before the said scrip was filed upon said lands, and it was erroneous interpretation and construction of said act and the law applicable thereto on the part of the Secretaries of the Interior, and contrary to the previous rulings and practice of the Land Department, to hold that by said tranactions a sale and assignment of the scrip was effected, or to hold that the acts of the said attorney in fact, said Frank W. Eaton, in the location of said scrip, by reason of said acts on the part of said Orillie Stram, were invalid, inasmuch as the said scrip by the said attorney in fact was located upon said lands and the said lands were taken in the name of said Orillie Stram and subject to her disposal; 79 80

That the said decisions and interpretations of the law by the said Secretaries of the Interior in holding that the said improvements were made in the interest of the said scripee was erroneous in that the same being made in the interest of the entry of the said lands for and in the name of the said scripee and the locations of said scrip thereon were in law made for the benefit and in the interest of the said scripee and in support of said entry, and the law does not require such scripee 81

to make the same in person nor the same be made for her personal use, nor that she should have direct connection with the land;

That the decision of the said Secretaries of the Interior in holding that after the said scrip had been located upon said lands in the name of said
82 scripee, Orillie Stram, the deed of confirmation thereof given by the said Orillie Stram, her husband, joining, which was given to said Frank W. Eaton, on or about March 31st, 1886, was ineffectual, were erroneous and based upon a mistaken construction of the law, inasmuch as said lands having been entered in the name of said Orillie Stram, whether the said power of attorney to sell and convey the same was invalid or not, became immaterial, for the said scripee herself,
83 as found by said decisions, confirmed the acts of the said attorney in fact to sell and convey said lands, and conveyed the same herself to those who were claiming thereunder; and erroneous further in this that it was entirely competent and lawful for the said scripee to act by and through another as her attorney in the selection and location of said lands, and that if said power of attorney to sell and dispose of the lands was invalid, the said lands still remained the property of the said
84 scripee until she executed and delivered said confirmatory deed and up to the time of said decision no valid, adverse claims attached to said lands.

17. That under and by the erroneus decisions of the said secretaries it was attempted to throw said lands open for preemption or for the location of other scrip, as public lands of the United States, and that by virtue of said erroneous decisions of the Land Department assumed to allow,

subsequent to the rendition of said decisions, other parties to come in and apply for the said lands, notwithstanding the fact that during all of this time these defendants and their associates in the ownership of undivided interest in the said land, were in possession of said lands when such proceedings were had pursuant to said erroneous decisions of said Land Department, to which neither these defendants, nor any persons by, through and under whom they claim, were parties. 85

After the decisions of the said secretaries denying the validity of the said scrip locations, but the exact time of which is to defendants unknown, the Land Department of the United States, as defendants are informed and believe, pretended to allow one Frank Hicks to enter the lands described in the complaint, and thereafter, as defendants are informed and believe, issued the patent to the said Hicks for the said lands; but defendants allege that they were not parties to any of the proceedings whereby the said Hicks was permitted to enter and obtain said lands, and further allege that no right, title or interest in and to said lands passed to the said Hicks by the said pretended acts of the Land Department; and these defendants further allege upon information and belief, that the plaintiff obtained its pretended title to the lands mentioned in the complaint from the said Hicks, and that the plaintiff has no other right, title or interest, except that obtained through the said Frank Hicks. 86 87

18. Defendants further allege, that after the filing and location of the said scrip and the adjustment thereof to the said lands, neither the Land Department of the United States, nor any

of its officers, had any jurisdiction whatsoever to deal with said lands or to dispose of the same, or to throw them open to public entry by other persons, or do any act in connection therewith, except it be to cause a patent therefor to issue for said lands to the said Orillie Stram, and allege the fact to be that by the terms of said grant
88 and the said act of Congress as hereinbefore set forth, and the practice of the department then in vogue, the title to said lands had actually passed to the said Orillie Stram as effectually as though a patent in form had been issued therefor to the said Orillie Stram. And that in truth and in fact, the said Orillie Stram, and those claiming under her, thereupon became the owners of the title to said lands, both legally and equitably,
89 and allege that the patent issued to the said Frank Hicks and the entry upon which said patent was issued were erroneously allowed, and the same were allowed and issued without warrant or authority of law; and that if it should be held that the said Hicks and those claiming under him took any title whatsoever to said premises under said patent, that at most it could be but the bare legal title thereto held in trust for the benefit of the owners of the equitable title to said lands, and that these defendants and their co-defendants as
90 the owners of the equitable title to said premises are entitled to a conveyance of the legal title to said lands in question.

III.

19. Further answering said complaint and by way of counter-claim, these defendants allege that the defendant Merrill M. Clark is the owner

of an undivided one-fourth interest and that the said Richard H. Fagan is the owner of an undivided one-sixth interest in and to the lands described in said complaint, and in connection with the owners of the other undivided interests in said lands, that these defendants and the owners of the other undivided interests in said premises, to-wit: Frank W. Eaton and Nicholas Lonstorf 91
have been in possession of said lands by and through their agents for the passed fourteen years, and have claimed to own said lands during all of said time, under and by virtue of the said conveyances of the said premises from the said Orillie Stram to these defendants, the deeds of which conveyances have been on record in the office of the Register of Deeds in the county where said premises are located for more than thirteen years 92
last passed.

And defendants further allege that the said plaintiff and all other persons hereinbefore mentioned under whom it claims, have at all times had knowledge of the rights, interest and ownership of the defendants herein, and of the rights of those under whom these defendants claim, and that the said plaintiff, and those through whom it claims to have derived its title in and to said premises, have had knowledge of the possession of the premises in question by these defendants, by and 93
through their agents,

Wherefor, these defendants pray the court.

I. That the plaintiff take nothing by this action.

II. That it be adjudged, determined and decreed that the plaintiff has no right, title, interest or estate in or to said lands, or any part thereof, or lien thereon.

III. That it be adjudged, determined and decreed that the defendant Merrill M. Clark is the owner of an undivided one-fourth interest and the defendant Richard H. Fagan is the owner of an undivided one-sixth interest in and to the said lands in fee simple, and that it be adjudged, determined and decreed that they are the owners
94 of both the legal and equitable title to the respective interests in the said lands.

IV. That it be adjudged, determined and decreed that the title which the said Frank Hicks obtained by the issuants of the patents to him for said premises, as hereinbefore set forth, was the bare legal title, and that the said legal title has been held in trust by the said Frank Hicks and the plaintiff herein claiming under him, for these de-
95 fendants, and that the said plaintiff be adjudged, ordered and decreed to convey all its rights, title and interest in and to the lands described in said complaint, to these defendants, in the proportions hereinbefore set forth, and that said decree may be so framed that in default of such conveyance by the plaintiff, the decree itself, shall operate as a conveyance of said premises.

V. And for such other and further relief as to the court may seem just and proper in the
96 premises.

Dated Duluth, Minn., April 21st, 1899.

WASHBURN, LEWIS & BAILEY,
Attorneys for Defts. Merritt, Clark and Fagan,
500-505 Lonsdale Bldg., Duluth, Minn.

STATE OF MINNESOTA, COUNTY OF ST. LOUIS.—ss.

Leonidas Merritt and Merrill M. Clark and Richard H. Fagan, being duly sworn depose and say that they are defendants in the above entitled action; that they have read the foregoing answer, and that the same is true of their own knowledge, except as to those matters stated on information and belief, and as to those, they believe them to be true. 97

LEONIDAS MERRITT,
MERRILL M. CLARK,
RICHARD H. FAGAN.

Subscribed and sworn to before me this 21st day of April, 1899.

WILLIAM D. BAILEY,
Notary Public, St. Louis Co., Minn. 98

(Seal.)

STATE OF MINNESOTA, COUNTY OF ST. Louis. District Court, Eleventh Judicial District.

THE MIDWAY COMPANY, Plaintiff, 99

vs.

FRANK W. EATON, LEONIDAS MERRITT, RICHARD H. FAGAN AND MERRILL M. CLARK, Defendants.

Answer of Frank W. Eaton by Towne and Harris and Frank Cutting, his attorneys.

(This answer is not set forth at length, because it is in substantially the same form as the preceding answer of Merritt, Clark and Fagan, and alleges the ownership by Eaton of thirteen thirty-sixths (13-36) of the premises in question.)

100 .....

STATE OF MINNESOTA, COUNTY OF ST. Louis. District Court, Eleventh Judicial District.

THE MIDWAY COMPANY, Plaintiff,

vs.

101 FRANK W. EATON, LEONIDAS MERRITT, RICHARD H. FAGAN AND MERRILL M. CLARK, Defendants.

REPLY.

The plaintiff for its reply to the separate answer of the defendants, Leonidas Merritt, Merrill M. Clark and Richard H. Fagan,

102 Admits that on the 17th day of July, A. D. 1854, the Congress of the United States passed the Act entitled, "An Act to authorize the President of the United States, to cause to be surveyed a tract of land in the Territory of Minnesota, belonging to the half-breeds and mixed bloods of the Dakota or Sioux nation of Indians, and for other purposes," referred to in the said answer.

Admits that the United States survey of the lands described in the complaint herein was filed in the local land office at Duluth, Minnesota, on or about the 20th day of July, A. D. 1885.

Admits that shortly after the filing of said survey, one Thomas Hyde made an application to make a preemption filing upon lots five (5) and 103
six (6), and the southeast quarter of the northwest quarter (S. E. 1-4 of N. W. 1-4) of said section and that said application was denied by the local land officers at Duluth aforesaid, and that on or about the same time one Angus McDonald made a like application on lot two (2), and the north half of the southeast quarter (N. 1-2 of S. E. 1-4), and the southwest quarter of the northeast quarter (S. W. 1-4 of N. E. 1-4) of said section, and that said application was also denied by the said local 104
land officers, on the ground that the said lands had already been appropriated by the location of said scrip thereon, and also on the ground that the applications of said Hyde and McDonald were not made in good faith, but were made in fraud and in violation of the preemption laws of the United States, and were affected by fraudulent and unlawful intent, rendering the same invalid, and that it was duly and properly determined by the local land officers, and sustained by depart- 105
mental decision that neither the said Hyde nor the said McDonald ever had or obtained any right whatsoever in or to the said lands by virtue of said preemption filings, or by virtue of any subsequent proceedings on the part of the said Hyde or McDonald, or either of them, to obtain said lands, and that said preemption filings were void and invalid, and contrary to the laws of the United States, and that said Hyde and McDonald there-

by obtained no preference right of entry, or any rights of any character in or to the said lands, or any part thereof.

The plaintiff further admits, that notwithstanding the said decision the said Hyde and McDonald made in the Land Department of the
106 United States in or about the month of November, 1885, an attack upon the pretended location of scrip or certificates which had been made in the name of Orillie Stram, upon the lands described in the complaint, charging that the said Orilie Stram had never made any improvements on said lands, either in person or by agents or attorney, and that the said lands were at the time of said attempted location unsurveyed lands and could be located only after such improvements had been made,
107 and supported the same by an affidavit, in which the said Orillie Stram denied giving said power to said Eaton, or any authority to locate the scrip, or erect buildings or make improvements on the said lands, or on any land for her use or benefit, and denies that the said affidavit had been obtained from said Orillie Stram by misrepresentation, and admits that such charges on the part of the said Hyde and McDonald, culminated in a hearing thereon in the local land office at Duluth,
108 Minnesota, on the 6th day of April, A. D. 1886, which resulted in a decision for the local land officers sustaining the said scrip locations, but as to whether, in the said decision, the said local land officers made the particular holdings, or any of them, alleged in the said answer to have been made by them, the plaintiff denies that it has any knowledge or information sufficient to form a belief.

The plaintiff further admits that from said decision, the contestants, Hyde and McDonald appealed to the General Land Office, but whether upon the particular grounds, or any of them, in said answer alleged, the plaintiff denies that it has any knowledge, or information sufficient to form a belief.

109

Admits that pending said proceedings on appeal other parties made application to contest the said scrip locations, and also to contest the preemption claims of said Hyde and McDonald, which under the instructions of the Commissioner of the General Land Office in August, 1887, were held subject to the final disposition of said appeal.

Admits that upon said appeal the Commissioner of the General Land Office made his decision and found that the said attempted scrip locations were not valid, and should be cancelled as speculative, and made with intent to evade the law, rather than comply with the legal requirements, but as to whether by the said decision they were made the further particular findings, or any of them, alleged in the said answer, the plaintiff denies that it has any knowledge or information sufficient to form a belief.

110

Further answering the plaintiff admits that an appeal from the said decision was taken from the General Land Office to the Secretary of the Interior, on or about the fourth day of August, 1888, by said Orillie Stram and Frank W. Eaton, but as to whether in or upon said appeal there were assigned the particular specifications of error, or any of them, in the said answer alleged, the plaintiff denies that it has any knowledge or information sufficient to form a belief.

111

The plaintiff further admits that thereafter, and on or about the 18th day of February, 1889, the Honorable William F. Vilas, then Secretary of the Interior of the United States, decided said cause on appeal, and held that the said scrip locations were invalid, and that said decision was
112 afterwards, on the 28th day of January, 1891, confirmed by the Honorable John W. Noble, then Secretary of the Interior, and that it was also determined in the decisions of both secretaries, that neither Hyde nor McDonald, nor any person or persons whomsoever had any right, title or interest in or to said land, or any part thereof, or any claim thereon, and that at no time, either intervening between said location of said scrip upon unsurveyed land, and the time of the adjust-
113 ment of said scrip to the same as surveyed land, or at any other time, had they valid rights attached to said lands, and that the said lands were thus left open to disposal under the public land laws of the United States applicable thereto.

Further replying the plaintiff alleges, that the said decisions of said secretaries, were duly rendered upon testimony taken on behalf of all parties then claiming interests in said land, or who had made or attempted to make any of the said
114 locations, entries, filings, or contests, duly taken upon issues duly framed and made by and between them in the said Land Department (all of said parties having been duly cited to appear in said hearings and proceedings, and having duly appeared and participated therein) upon the question among others, whether any improvements had ever been made, upon any of the lands described in the complaint herein, or upon which the said pretended scrip location had

been attempted to be made, by or on behalf of the said Orillie Stram, in whose name the said pretended scrip location had been attempted, and it was found and determined as matter of fact, in and by the decisions of both of the said Secretaries of the Interior, that no such improvements had ever been made, by the said Orillie Stram, or for her use or benefit, or by any one acting on her behalf, and that the said Orillie Stram, never had any interest in the said land, or in the attempted location thereof with the said scrip, and had parted with all her interest in the said scrip long prior to the time when it was claimed that the improvements upon the said land had been made,under the direction of Frank W. Eaton, in the said answer mentioned, all of which findings are in fact true, and all of which findings of fact the plaintiff alleges are conclusive against and an estoppel upon the defendants, Leonidas Merritt, Richard H. Fagan and Merrill M. Clark, and the other parties to the said hearings, and persons claiming under them. 115 116

The plaintiff further admits that after the said decisions the Land Department of the United States allowed one Frank Hicks to enter the lands described in the complaint and thereafter issued a patent to the said Frank Hicks for the said lands, and that the plaintiff herein obtained its title to the lands mentioned in the complaint from the said Frank Hicks. 117

Further replying, the plaintiff denies each and every allegation and part thereof in the said separate answer contained, not hereinbefore specifically admitted or denied.

WALTER AYERS,
Attorney for Plaintiff.

STATE OF MINNESOTA, COUNTY OF ST. LOUIS.—ss.

Walter Ayers, being duly sworn, upon his oath sayeth, that he is the attorney for the plaintiff in the above entitled action and that the foregoing answer is true to the best of his knowledge
118 and belief;

That no officer of the plaintiff, the Midway Company, is present in St. Louis County, Wherefore this affidavit is made by deponent.

WALTER AYERS.

Sworn to and subscribed this 24th day of April, A. D. 1899, before me,

C. O. BALDWIN,
Senator 31st District, Minn.

119

STATE OF MINNESOTA, COUNTY OF ST. Louis. District Court, Eleventh Judicial District.

THE MIDWAY COMPANY, Plaintiff,

vs.

120 FRANK W. EATON, LEONIDAS MERRITT, RICHARD H. FAGAN AND MERRILL M. CLARK, Defendants.

The plaintiff for its reply to the separate answer of the defendant, Frank W. Eaton.

Admits that on the 17th day of July, A. D. 1854, the Congress of the United States passed the Act entitled, "An Act to authorize the Presi-

dent of the United States, to cause to be surveyed a tract of land in the Territory of Minnesota, belonging to the half-breeds and mixed bloods of the Dakota or Sioux nation of Indians, and for other purposes," referred to in the said answer.

Admits that the United States survey of the lands described in the complaint herein was filed in the local land office at Duluth, Minnesota, on or about the 20th day of July, A. D. 1885. 121

Admits that shortly after the filing of said survey, one Thomas Hyde made an application to make a preemption filing upon lots five (5) and six (6), and the southeast quarter of the northwest quarter (S. E. 1-4 of N. W. 1-4) of said section, and that said application was denied by the local land officers at Duluth aforesaid, and that on or about the same time one Angus McDonald made a like application on lot two (2), and the north half of the southeast quarter (N. 1-2 of S. E. 1-4), and the southwest quarter of the northeast quarter (S. W. 1-4 of N. E. 1-4) of said section, and that said application was also denied by the said local land officers, on the ground that the said lands had already been appropriated by the location of said scrip thereon, and also on the ground that the applications of said Hyde and McDonald were not made in good faith, but were made in fraud and in violation of the preemption laws of the United States, and were affected by fraudulent and unlawful intent, rendering the same invalid, and that it was duly and properly determined by the local land officers, and sustained by departmental decision that neither the said Hyde nor the said McDonald ever had or obtained any right whatsoever in or to the said lands by virtue of 122 123

said preemption filings, or by virtue of any subsequent proceedings on the part of the said Hyde or McDonald, or either of them, to obtain said lands, and that said preemption filings were void and invalid, and contrary to the laws of the United States, and that said Hyde and McDonald thereby obtained no preference right of entry, or any
124 rights of any character in or to the said lands, or any part thereof.

The plaintiff further admits, that notwithstanding the said decision the said Hyde and McDonald made in the Land Department of the United States in or about the month of November, 1885, an attack upon the pretended location of scrip or certificates which had been made in the name of Orillie Stram, upon the lands described in
125 the complaint, charging that the said Orilie Stram had never made any improvements on said lands, either in person or by agents or attorneys, and that the said lands were at the time of said attempted location unsurveyed lands and could be located only after such improvements had been made, and supported the same by an affidavit, in which the said Orillie Stram denied giving said power of said Eaton, or any authority to locate the scrip, or erect buildings or make improvements on the
126 said lands, or on any land for her use or benefit, and denies that the said affidavit had been obtained from said Orillie Stram by misrepresentation, and admits that such charges on the part of the said Hyde and McDonald, culminated in a hearing thereon in the local land office at Duluth, Minnesota, on the 6th day of April, A. D. 1886, which resulted in a decision for the local land officers sustaining the said scrip locations, but as to whether, in the said decision, the said local

land officers made the particular holdings, or any of them, alleged in the said answer to have been made by them, the plaintiff denies that it has any knowledge or information sufficient to form a belief.

The plaintiff further admits that from said decision, the contestants, Hyde and McDonald ap- 127
pealed to the General Land Office, but whether upon the particular grounds, or any of them, in said answer alleged, the plaintiff denies that it has any knowledge, or information sufficient to form a belief.

Admits that pending said proceedings on appeal other parties made application to contest the said scrip locations, and also to contest the preemption claims of said Hyde and McDonald, which under the instructions of the Commissioner of the 128
General Land Office in August, 1887, were held subject to the final disposition of said appeal.

Admits that upon said appeal the Commissioner of the General Land Office made his decision and found that the said attempted scrip locations were not valid, and should be cancelled as speculative, and made with intent to evade the law, rather than comply with the legal requirements, but as to whether by the said decision they were made the further particular findings, or any 129
of them, alleged in the said answer, the plaintiff denies that it has any knowledge or information sufficient to form a belief.

Further answering the plaintiff admits that an appeal from the said decision was taken from the General Land Office to the Secretary of the Interior, on or about the fourth day of August, 1888, by said Orillie Stram and Frank W. Eaton,

but as to whether in or upon said appeal there *were assigned the particular* specifications of error, or any of them, in the said answer alleged, the plaintiff denies that it has any knowledge or information sufficient to form a belief.

The plaintiff further admits that thereafter,
130 and on or about the 18th day of February, 1889, the Honorable William F. Vilas, then Secretary of the Interior of the United States, decided said cause on appeal, and held that the said scrip locations were invalid, and that said decision was afterwards, on the 28th day of January, 1891, confirmed by the Honorable John W. Noble, then Secretary of the Interior, and that it was also determined in the decisions of both secretaries, that neither Hyde nor McDonald, nor any person or per-
131 sons whomsoever had any right, title or interest in or to said land, or any part thereof, or any claim thereon, and that at no time, either intervening between said location of said scrip upon unsurveyed land, and the time of the adjustment of said scrip to the same as surveyed land, or at any other time, had they valid rights attached to said lands, and that the said lands were thus left open to disposal under the public land laws of the United States applicable thereto.

132 Further replying the plaintiff alleges, that the said decisions of said secretaries, were duly rendered upon testimony taken on behalf of all parties then claiming interests in said land, or who had made or attempted to make any of the said locations, entries, filings, or contests, duly taken upon issues duly framed and made by and between them in the said Land Department (all of said parties having been duly cited to appear in said hearings and proceedings, and having duly

appeared and participated therein) upon the question among others, whether any improvements had ever been made, upon any of the lands described in the complaint herein, or upon which the said pretended scrip locations had been attempted to be made, by or on behalf of the said Orillie Stram, in whose name the said pretended scrip locations had been attempted, and it was found and determined as matter of fact, in and by the decisions of both of the said Secretaries of the Interior, that no such improvements had ever been made, by the said Orillie Stram, or for her use or benefit, or by any one acting on her behalf, and that the said Orillie Stram, never had any interest in said land, or in the attempted location thereof with said scrip, and had parted with all her interest in the said scrip long prior to the time when it was claimed that the improvements upon said land had been made, under the direction of Frank W. Eaton, in the said answer mentioned, all of which findings are in fact true, and all of which findings of fact the plaintiff alleges are conclusive against and an estoppel upon the defendants, Leonidas Merritt, Richard H. Fagan and Merrill M. Clark, and the other parties to the said hearings, and persons claiming under them.

133

134

135

The plaintiff further admits that after the said decisions the Land Department of the United States allowed one Frank Hicks to enter the lands described in the complaint and thereafter issued a patent to the said Frank Hicks for the said lands, and that the plaintiff herein obtained its title to the lands mentioned in the complaint from the said Frank Hicks.

Further replying, the plaintiff denies each and every allegation and part thereof in the said separate answer contained, not hereinbefore specifically admitted or denied.

WALTER AYERS,
Attorney for Plaintiff.

136

STATE OF MINNESOTA, COUNTY OF ST. LOUIS.—ss.

Walter Ayers, being duly sworn, upon his oath sayeth, that he is the attorney for the plaintiff in the above entitled action and that the foregoing answer is true to the best of his knowledge and belief;

137 That no officer of the plaintiff, the Midway Company, is at present in St. Louis County, Wherefore this affidavit is made by deponent.

WALTER AYERS.

Sworn to and subscribed this 24th day of April, A. D. 1899, before me,

C. O. BALDWIN,
Senator 31st District, Minn.

138

STATE OF MINNESOTA, COUNTY OF ST. Louis.—ss. District Court, Eleventh Judicial District.

THE MIDWAY COMPANY, Plaintiff,

vs. 139

FRANK W. EATON, LEONIDAS MERRITT, RICHARD H. FAGAN AND MERRILL M. CLARK, Defendants.

STIPULATION.

In the above entitled cause it is hereby stipulated and agreed by and between the Midway 140
Company, the above named plaintiff, through its attorney, Walter Ayers, and Margaretha Lonstorf, by her attorneys, Messrs. Phelps and McClintock, that said Margaretha Lonstorf be and she is hereby made a party defendant in said above entitled action, and that said parties be held and bound by the determination of said action as fully and effectually as if said Margaretha Lonstorf had originally been made a party thereto.

It is further stipulated and agreed by the 141
said parties, through their respective attorneys above named, that said Margaretha Lonstorf be, and she is hereby permitted to answer to plaintiff's complaint in said cause, and that the answer of Leonidas Merritt, Merrill H. Clark and Richard H. Fagan, heretofore filed and served in said cause by their attorneys, Messrs Washburn, Lewis and Bailey, be and stand as the answer of said Margaretha Lonstorf therein.

It is further stipulated and agreed by and between said parties, and their respective attorneys, that in addition to the allegations contained in the answer of said Merritt, Clark and Fagan in all things standing as the answer of the said Margaretha Lonstorf, that said Margaretha Lonstorf be, and she is hereby permitted to insert in
142 lieu of paragraph 13 of said answer, the following: (thereby setting forth the claim of title of said Lonstorf), to-wit:

13. "That through sundry mesne conveyances this defendant, Margaretha Lonstorf, has become the owner of an undivided two-ninths interest in and to said lands, and said Eaton, Clark and Fagan of the remainder thereof, and have succeeded to the ownership of said undivided in-
143 terest as aforesaid, of all the right, title and interest which said Orillie Stram, (formerly Orillie Moreau) at any time had in and to said lands, and that the said lands described in the said complaint is a part and portion of said lands."

It is further stipulated and agreed that said Margaretha Lonstorf be, and she is hereby permitted to further answer as follows:

"That long before the commencement of this action, and in the month of July, 1889, the said
144 Nicholas Lonstorf duly made, executed and published his last will and testament, giving and devising unto this defendant his undivided interest in the land and premises described in plaintiff's complaint.

That thereafter and long before the commencement of this action the said Nicholas Lonstorf died testate, leaving this defendant his sole heir and thereupon the said interest of said Nich-

olas Lonstorf in said land and premises passed and descended to this defendant, who thereupon became and ever since has been and is now the owner of an undivided two-ninths interest in said land and premises.

That after the death of said Nicholas Lonstorf and long before the commencement of this 145
action, said will of said Lonstorf was duly admitted to probate in said St. Louis County and was duly recorded in the offices of the Judge of Probate and Register of Deeds in and for said county."

It is further stipulated that the reply of the plaintiff herein to the separate answer of Leonidas Merritt, Richard H. Fagan and Merrill M. Clark, shall stand and be taken as the reply of the plaintiff herein to the answer of the defendant 146
Margaretha Lonstorf, except as to the additional matter which it is herein stipulated may be inserted into the answer of said Margaretha Lonstorf and as to such additional matter, the same is to be deemed denied by the plaintiff;

It is further sitpulated, that said action shall proceed to trial as to said Margaretha Lonstorf in the same manner as if she had been made a party thereto in the first instance, and had been duly served with a notice of trial herein for the May, 147
1899 General Term of said court, said cause now being set for trial.

Dated at Duluth, Minn., this 20th day of May, 1899.

WALTER AYERS,
Attorney for Plaintiff.

PHELPS & McCLINTOCK,
Attorneys for Margaretha Lonstorf.

STATE OF MINNESOTA, COUNTY OF ST. Louis. District Court, Eleventh Judicial District.

THE MIDWAY COMPANY, Plaintiff,

vs.

148 FRANK W. EATON, et al., Defendants.

It having been stipulated by and between the plaintiff herein and Margaretha Lonstorf that the said Margaretha Lonstorf should be made a party defendant in the above entitled action in the same manner and with the same effect as if she had been named in the summons and complaint
149 herein as a party defendant, and that the said Margaretha Lonstorf should be bound by the determination of said action and the said Margaretha Lonstorf having appeared and answered in said cause,

Now on motion of Walter Ayers, one of the attorneys of the plaintiff herein, it is ordered that the said Margaretha Lonstorf be, and she hereby is, made a party defendant in said action in the same manner and with the same effect as if she
150 had been named in the summons and complaint herein as a party defendant.

Dated May 25th, A. D. 1899.

By the Court,

S. H. MOER, Judge.

We consent to the making and entry of the above order.

PHELPS & McCLINTOCK,
Attorneys for Margaretha Lonstorf.

STATE OF MINNESOTA, COUNTY OF ST. Louis. District Court, Eleventh Judicial District.

THE MIDWAY COMPANY, Plaintiff,

vs.

FRANK W. EATON, LEONIDAS MERRITT, RICHARD H. FAGAN AND MERRILL M. CLARK, AND MARGARETHA LONSTORF, Defendants.

This cause being on the calendar of the General May 1899 Term of this Court came on for trial in due course before the undersigned judge of said court without a jury at the court house in the City of Duluth in the County of St. Louis and State of Minnesota, on the 12th day of June, 1899, Walter Ayers and P. H. Seymour appearing as attorneys for the plaintiff, Washburn, Lewis and Bailey appearing as attorneys for the defendants, Leonidas Merritt, Richard H. Fagan and Merrill M. Clark, and Towne and Harris and Frank Cutting appearing as attorneys for the defendant Frank W. Eaton, W. B. Phelps appearing as attorney for the defendant Margaretha Lonstorf and the court having heard and considered the evidence adduced upon said trial and the arguments of the respective attorneys therein hereby makes and files its findings of fact and conclusions of law in said cause:

FINDINGS OF FACT.

1. That one Orillie Moreau afterwards married to one Stram and thereafter known as Orillie

Stram was one of the parties entitled to the benefits of the Act of Congress of the United States of July 17th, 1854, entitled "An Act to authorize the President of the United States to cause to be surveyed a tract of land in the Territory of Minnesota, belonging to the half-breeds and mixed bloods
154 of the Dacotah or Sioux nation of Indians and for other purposes" and of the treaty negotiated with said half-breeds and mixed bloods in pursuance of said Act by the President of the United States, and in the pursuance thereof there was issued to said Orillie Moreau certificates commonly known as Sioux half-breed scrip numbered 19E. and 19D., entitling said Orillie Moreau, afterwards Stram, to select, take and have of the public lands of the United States of the classes mentioned in said
155 Act, 320 acres of such land each of certificates or scrip being for 160 acres.

2. That thereafter and on the 16th day of June, A. D. 1883, the said Orillie Moreau then Orillie Stram, never having theretofore made use of the said certificates of scrip and the same never having been in any manner extinguished or satisfied, through the defendant Frank W. Eaton, who had theretofore been by her duly empowered as her attorney in fact for that purpose, presented
156 said scrip at the local land office in Duluth, Minnesota, and then and there made application to locate the same on certain then unsurveyed lands of the United States in said district in which said land office was located and did then and there enter and file upon by virtue of said scrip the lands for which said application was made as aforesaid and filing therewith a diagram or plat of said land embracing a sufficient description thereof to properly designate the same, which

lands were in said application described by metes and bounds as follows: Starting at the quarter post on the east line of section 25, township 63, north of range 12, west; thence running east 240 rods for a place of beginning, thence south 80 rods, thence east 80 rods, thence north 80 rods, thence east 80 rods, thence north 160 rods, thence west 80 rods, thence south 80 rods, thence west 80 rods, thence south 80 rods to the place of beginning, the same being located under said scrip number 19E; also commencing at the quarter post on the east line of section 25, in township 63, north of range 12, west; running thence north on said section line 80 rods, thence east 80 rods, thence north 80 rods, thence east 80 rods, thence south 80 rods, thence east 80 rods, thence south 80 rods, thence west 240 rods to the place of beginning, the same being located under scrip number 19D, each of said locations embracing 160 acres of land, the same not being lands reserved by the Government of the United States for any purpose whatsoever. That prior to the location of said scrip upon said land as above found improvements had been made thereon consisting of a house 14 by 16 feet, by and under the authority of the said Frank W. Eaton. 157 158

3. That thereafter and on the 20th day of July, 1885, said lands having been duly surveyed and platted, the plat and survey of said township and of said lands made by and under the authority of the Government of the United States was duly filed in the local land office at the City of Duluth, Minnesota, and thereupon and on the 21st day of July, 1885, upon application of the said Orillie Stram acting by and through her said attorney in fact said certificate of Sioux half- 159

breed scrip number 19D was adjusted to and upon lots 3, 5 and 6 and the southeast quarter of the northwest quarter of section 30 in township 63, north of range 11, west, and said certificate of Sioux half breed scrip number 19E was adjusted upon lots 1 and 2 and the southwest quarter of the
160 northeast quarter and the northwest quarter of the southeast quarter of section 30, township 63, north of range 11, west, being the same lands hereinbefore described by metes and bounds and then and there and on that day said certificates of scrip were duly located upon the said surveyed lands and the said lands as surveyed lands were taken and appropriated under and by virtue of said scrip and the locations of said scrip were at said time allowed by the officers of the local land office at
161 Duluth, Minnesota, there not being at said time nor at the time when the scrip was located on said unsurveyed lands nor at any other time any valid adverse claims to said lands and on the 21st day of July, 1885, receiver's final receipts and certificates of entry and filing were duly and regularly issued to said Orillie Stram which were duly and regularly recorded in the office of the Register of Deeds for the County of Lake and State of Minnesota and also in the office of the Register of
162 Deeds for the County of St. Louis and State of Minnesota within a few days thereafter.

4. That through sundry mesne conveyances duly of record the defendants Merrill M. Clark, Richard H. Fagan, Frank W. Eaton and Margaretha Lonstorf have succeeded to the rights and interests of the said Orillie Stram in and to the said lands in the following proporfions respectively: Frank W. Eaton, the undivided 13-36, Merrill M. Clark, the undivided 9-36, Margaretha Lonstorf

the undivided 8-36 and Richard H. Fagan the undivided 6-36 and the said defendants are still the owners of the said lands in said proportions.

5 That on the 20th day of July, 1885, one Thomas Hyde made an application to make a preemption filing upon lots 5 and 6 and the southeast quarter of the northwest quarter of said section heretofore referred to which application was denied by the local land officers at Duluth, Minnesota, and upon the same day one Angus McDonald made a like application for lot 2 and the north half of the southeast quarter and the southwest quarter of the northeast quarter of said section heretofore referred to, which application was also denied by the local land officers both on the ground that said lands had already been appropriated by the location of the said scrip thereon and also that the applications of the said Hyde and the said McDonald were not made in good faith but were made in fraud and in violation of the preemption laws and were effected by a fraudulent and unlawful intent rendering the same invalid and that it was duly determined by the local land officers and sustained by the decision of the Commissioner of the General Land Office and also by the Secretary of the Interior that neither the said Hyde nor the said McDonald ever had or obtained any rights whatsoever in or to the said lands by virtue of said application for preemption filings or by virtue of any subsequent proceedings on their part or either of them but that notwithstanding the same the said Hyde and the said McDonald made an attack upon the said decisions of the Land Department some time in November, 1885, and upon the location of the said certificates of scrip and of the entry of the said

lands thereunder; that a hearing before the local land officers at Duluth, Minnesota, was ordered and had on the 6th day of April, 1886, resulting in a decision of the said local land officers sustaining the said scrip locations from which said decision and appeal was taken to the Commissioner
166 of the General Land Office by the said Hyde and McDonald and a hearing was had thereon before said Commissioner upon which said Commissioner held adversely to the said scrip locations, whereupon an appeal being taken to the Secretary of the Interior of the United States and a hearing had thereon the said Secretary of the Interior on the 18th day of February, 1889, by his decision a copy of which is hereto annexed marked "Exhibit A" and made a part hereof, held and determined that
167 neither said Hyde nor said McDonald had any right or interest in or valid claims to said lands or any thereof whatsoever, notwithstanding the same in said decision the said Secretary of the Interior held and decided that said Orillie Stram and those claiming under her were not entitled to said land under and by virtue of said scrip locations and held that said scrip locations upon said land were illegal and invalid for the following reasons, to-wit: First, that the said improve-
168 ments made upon said lands while it was yet unsurveyed in aid of the location of said scrip upon said lands were not made under the personal supervision and direction of the said Orillie Stram and that she had not had personal contact with the land; second, that by reason of the fact that the said Orillie Stram had executed and delivered to the said Frank W. Eaton a power of attorney to locate the said scrip and at the same time executed and delivered a power of attorney to Leon-

idas Merritt to sell the lands that should be located under and by virtue of said pieces of scrip after the same were located, that the said transactions operated in law as an assignment of the scrip and were in violation of that portion of the Act of July 17th, 1854, prohibiting assignments of the scrip issued thereunder and hence that said entry of the said lands was not for the benefit of said Orillie Stram; third, that the location of said lands and the adjustment of said scrip thereto after the said lands were surveyed and the plat of said township filed, notwithstanding no intervening rights had accrued to any other parties, could not be effectual in view of the previous attempt to locate said scrip upon said lands while the same were unsurveyed and in view of the decision of said secretary relative to the question of improvements; fourth, the secretary held in said decision that the scripee had no power or right to alienate the land she was entitled to receive under and by virtue of said scrip before the location of the scrip or to make and contract for the sale of the same after the same should be located, or grant any power to another to sell the same for her after the same should be located, but held that the scripee had the right to sell the land immediately after the location of the scrip and the said Secretary of the Interior therefore and thereupon held that said lands should be thrown open for public entry and held the same to still be a part of the public domain and subject to entry.

169

170

171

6. That prior to the said hearing had before the local land officers at the City of Duluth, the said Orillie Stram and Roman Stram, her husband, executed and delivered to the said Frank W. Eaton, a certain instrument in writing, bear-

ing date the 31st day of March, 1886, which was thereafter, to-wit, on the 3rd day of April, 1886, duly recorded in the office of the Register of Deeds of said St. Louis county, and on the 24th day of April, duly recorded in the office of the Register of Deeds of Lake county, Minnesota, a true copy
172 of which said instrument is annexed to these findings, marked "Exhibit B" and made a part hereof.

7. That the said Midway Company and the said Germania Iron Company are each of them duly incorporated.

8. That thereafter and in pursuance of the said decision of the said Secretary of the Interior hereinbefore referred to the said lands were attempted to be thrown open for public entry and the United States of America, acting through its
173 officers, on the 10th day of May, 1898, issued and delivered to one Frank Hicks its patent in the usual form purporting to convey to the said Frank Hicks the premises described in the complaint herein, lots number 3, 5 and 6 of section 30, township 63, north of range 11, west of the fourth principal meridian.

9. That the said Frank Hicks together with Myrtle M. Hicks, his wife, by deed of general war-
174 ranty bearing date the 21st day of October, 1897, duly executed, acknowledged and recorded in the office of the Register of Deeds of St. Louis County on the 18th day of February, 1899, conveyed the premises hereinbefore described to the plaintiff herein who now holds whatever title thereto enured to the said Frank Hicks under said patent; that neither the said Orillie Stram, or her husband or said Clark, Eaton, Fagan or Lonstorf were in any manner parties to the proceedings subsequent to

the said decision of the Secretary of the Interior, rendered on the 18th day of February, 1889, whereby said patent was issued and that the plaintiff and said Hicks at all times had full knowledge of all the right and claims of the defendants and each of them in and to the said lands; that the premises described in the complaint are and at the time of the commencement of this action were situated in the County of St. Louis and State of Minnesota. 175

10. That the findings or determinations of fact by the said William F. Vilas, Secretary of the Interior as aforesaid, were fully sustained by the evidence in said cause presented to him by the record in said appeal, except it is found as a fact by this court, that the improvements caused to be erected by the said Frank W. Eaton, upon the said premises consisted of a house about 14 by 16 feet in size, and it is further found as a fact that from the evidence before the Secretary of the Interior in said cause presented to him by the record upon said appeal, it did not appear that the scrip referred to in the decision of said secretary had passed through many hands or through any hands before coming into the hands of the said Frank W. Eaton, nor did it appear that the powers of attorney to locate said scrip and to convey the land located therewith had been executed by the said Orillie Stram years before the location thereof by the said Frank W. Eaton, but that on the contrary it appeared from the evidence before the secretary that said powers of attorney were executed by the said Orillie Stram about one week before the location of the said scrip by the said Frank W. Eaton, and that the said powers did not contain the names of the grantees. It is further 176 177

found as a fact that it did not appear from the evidence before the said secretary that the said scripee never saw the said lands; it did not appear from the evidence before the said secretary that she had sold the said scrip long prior to the location thereof; it did not appear from the evi-
178 dence before the said secretary that for a long time she directly and positively repudiated Eaton and Merritt as her attorneys in fact, denying that they acted for her in any capacity whatsoever.

CONCLUSIONS OF LAW.

1. That the said decision of the said Secretary of the Interior, by which said secrtary held said scrip locations to be invalid and attempted
179 to throw said lands open for public entry was erroeous and contrary to law and founded upon a misrepresentation and misconception of the law applicable to the case, in this, among other things, (a) in holding that the locations of the said pieces of scrip upon the said lands while they were yet unsurveyed was invalid because of the fact that the improvements were not made upon said land under the personal supervision and direction of the said
180 Orillia Stram and because she had not come in personal contact with the said land; (b) in holding that the said locations of scrip upon the said lands were illegal and invalid because of the fact of the execution of a power of attorney to Frank W. Eaton to locate the said scrip and by reason of the fact of the execution of a power of attorney to the said Orillie Stram to the said Leonidas Merritt to transfer and convey the said lands that should be located under the said pieces of scrip; (c) by

holding that the said scripee had no right to alienate the land itself before the location of the said scrip thereon or to make any contract in regard to the same or any power to another to grant and convey the same when the same should be acquired; (d) in holding that the execution of the said powers of attorney operated in law as an assignment of the said scrip and in holding that the said transactions were in violation of that portion of the said act of July 17th, 1854, prohibiting assignments of the said scrip; (e) in holding that the appropriation of said lands under and by virtue of said scrip and the adjustment of said scrip thereto and the location of the same thereon after said lands had been surveyed and the plat of the said township filed were invalid as an independent location upon surveyed lands because of the previous location held by said secretary to be ineffectual of said scrip upon said lands as unsurveyed lands without regard to the question of improvements, no intervening rights of any other parties having accrued. 181 182

2. That under and by virtue of the said scrip locations as hereinbefore found the said scripee Orillie Stram, and those claiming under her became the owners of said lands and entitled to have a patent therefor issued by the United States to and in the name of the said Orillie Stram, and that the said Frank Hicks and the plaintiff claiming under him at most acquired nothing more than the bare legal title to said lands by virtue of the said patent issued to the said Frank Hicks, as hereinbefore found; and, that further than that, the said plaintiff has no right, title or interest in or to the said lands or any part thereof. 183

3. That the defendant, Frank W. Eaton, is the owner of an undivided 13-36 of the said land described in the complaint and the defendant Merrill M. Clark is the owner of an undivided 9-36 thereof and the defendant Margaretha Lonstorf is the owner of the undivided 8-36 thereof and the
184 defendant, Richard H. Fagan, is the owner of an undivided 6-36 thereof and are entitled to the judgment and decree of this court adjudging them to be such owners thereof in the said proportions free and clear of any claim of any right, title or interest therein on the part of said plaintiff and entitled to the judgment and decree of this court adjudging that whatever legal title the said plaintiff holds in and to the said premises that it holds the same in trust for the said defendants in the
185 proportions above specified and that the said defendants are entitled to the judgments and decree of this court adjudging and directing that the said plaintiff shall convey said premises to the said defendants in the proportions above specified and that upon failure to so convey the same a certified copy of such judgment to be entered hereon may be recorded in the office of the Register of Deeds of the proper county and when so recorded that such judgment shall operate to transfer and con-
186 vey said lands to the defendants as fully as though such conveyance were executed by the said plaintiff.

4. That the said defendants are entitled to have judgment in this cause for their costs and disbursements to be taxed.

Let judgment be rendered and entered accordingly.

Dated and signed this 27th day of December, 1899.

S. H. MOER,
Judge of the District Court.

187

EXHIBIT A.

DEPARTMENT OF INTERIOR,

WASHINGTON.

February 18th, 1889.

HYDE AND McDONALD,

vs.

EATON AND STRAM.

188

SIOUX HALF-BREED SCRIP.

THE COMMISSIONER OF THE GENERAL LAND OFFICE,

Sir: I have considered the case of Thomas W. Hyde and Angus McDonald vs. Frank W. Eaton, as attorney in fact for Orillie Stram, nee Moreau, on appeal by the latter from the decision of your office, dated August 4th, 1888, holding for cancellation Sioux half-breed scrip, Nos. 19D and 19 E., located and adjusted as follows:

189

Scrip No. 19 D. upon lots 3, 5 and 6 and S. E. 1-4 of N. W. 1-4 Sec. 30, and that numbered 19 E. upon lots 1 and 2 and S. W. 1-4 of N. E. 1-4 and N. W. 1-4 of S. E.1-4, same section, T. 63, N. R. 11, W., Duluth, Minnesota.

It appears that Frank W. Eaton, as attorney in fact for said Orillie Stram, nee Moreau, a Sioux half-breed Indian, filed in the Duluth, Minne-

3. That the defendant, Frank W. Eaton, is the owner of an undivided 13-36 of the said land described in the complaint and the defendant Merrill M. Clark is the owner of an undivided 9-36 thereof and the defendant Margaretha Lonstorf is the owner of the undivided 8-36 thereof and the
184 defendant, Richard H. Fagan, is the owner of an undivided 6-36 thereof and are entitled to the judgment and decree of this court adjudging them to be such owners thereof in the said proportions free and clear of any claim of any right, title or interest therein on the part of said plaintiff and entitled to the judgment and decree of this court adjudging that whatever legal title the said plaintiff holds in and to the said premises that it holds the same in trust for the said defendants in the
185 proportions above specified and that the said defendants are entitled to the judgments and decree of this court adjudging and directing that the said plaintiff shall convey said premises to the said defendants in the proportions above specified and that upon failure to so convey the same a certified copy of such judgment to be entered hereon may be recorded in the office of the Register of Deeds of the proper county and when so recorded that such judgment shall operate to transfer and con-
186 vey said lands to the defendants as fully as though such conveyance were executed by the said plaintiff.

4. That the said defendants are entitled to have judgment in this cause for their costs and disbursements to be taxed.

Let judgment be rendered and entered accordingly.

Dated and signed this 27th day of December, 1899.

S. H. MOER,
Judge of the District Court.

187

EXHIBIT A.

DEPARTMENT OF INTERIOR,

WASHINGTON.

February 18th, 1889.

HYDE AND McDONALD,

vs.

EATON AND STRAM.

188

SIOUX HALF-BREED SCRIP.

THE COMMISSIONER OF THE GENERAL LAND OFFICE,

Sir: I have considered the case of Thomas W. Hyde and Angus McDonald vs. Frank W. Eaton, as attorney in fact for Orillie Stram, nee Moreau, on appeal by the latter from the decision of your office, dated August 4th, 1888, holding for cancellation Sioux half-breed scrip, Nos. 19D and 19 E., located and adjusted as follows:

189

Scrip No. 19 D. upon lots 3, 5 and 6 and S. E. 1-4 of N. W. 1-4 Sec. 30, and that numbered 19 E. upon lots 1 and 2 and S. W. 1-4 of N. E. 1-4 and N. W. 1-4 of S. E.1-4, same section, T. 63, N. R. 11, W., Duluth, Minnesota.

It appears that Frank W. Eaton, as attorney in fact for said Orillie Stram, nee Moreau, a Sioux half-breed Indian, filed in the Duluth, Minne-

sota, local land office, on June 16th, 1883, the scrip above mentioned, and located the same on certain unsurveyed land in amount three hundred and twenty acres, which locations were subsequently adjusted by the local office and approved and posted by your office to embrace the tracts above described.

190 Said half-breed scrip bore date November 24th, 1856, and had been issued under the provisions of the Act of July 17th, 1854 (10 Stat., 304), to the Sioux half-breed named above.

July 20th, 1885, Angus McDonald presented at the local office a preemption application for lot 2, and the N. 1-2 of the S. E. 1-4 and S. W. 1-4 of N. E. 1-4 of said section 30, which that office rejected, because the N. E. 1-4 of the S. E.
191 1-4 was denominated swamp and overflowed land, and as to the residue of the tract because the date of settlement as alleged in the application to file did not antedate the unadjusted scrip location No. 19 E., with which it conflicted.

On the same day (July 20th, 1885), Thomas W. Hyde applied to make preemption filing for lots 5 and 6 and S. E. 1-4 of N. W. 1-4, and N. E. 1-4 of S. W. 1-4 of the same section (30), which application the local office rejected, for the reason
192 that the alleged date of settlement did not antedate the unadjusted scrip location, No. 19 D.

November 14th, 1885, a hearing was ordered by your office upon the application of McDonald and Hyde, who alleged "that the scripee never made any improvements whatever upon said land, either in person or by an agent or attorney, and that said land, at the date of the attempted locations, was unsurveyed and belonged to the class of land only locatable with such scrip after the

scripee shall have made improvements upon the same."

In support of the charges thus made was filed a copy of an affidavit (the original is now in the record), made October 9th, 1884, by the scripee, in which she denied ever having given to said Frank W. Eaton, either directly or indirectly, a 193
power of attorney, or any authority of any kind to locate said scrip or to erect buildings and make improvements on the land in controversy, or upon any other land for her use and benefit.

In refutation of the denial made as above by the scripee, Eaton filed copies of two powers of attorney given by him by said scripee and her husband, May 25th, 1883, conferring upon him the power and authority to locate said scrip, and to make the improvements, which under the Act of 194
1854, were necessary before location could be made on unsurveyed lands; also to do any other act necessary to be done in the premises, in order to secure a permanent and bona fide location, in the same manner as if done by them personally.

The case proceeded to hearing, which was had April 6th, 1886.

The register and receiver, after reference to the denial by the scripee that she had ever con- 195
stituted or appointed Frank W. Eaton her attorney in fact to locate the scrip or to make the improvements required for its location upon unsurveyed lands, also to the fact that her position up to date of hearing seemed to be that of one attempting to set aside powers of attorney wrongfully obtained from her; also to the endeavor of Hyde and McDonald on the day of the hearing to show that the scrip locations were illegal and

that they had bona fide preemption claims to the disputed tracts, found as follows:

1. The scrip in question was located upon unsurveyed lands on June 16th, 1883, more than one year before the preemptors settled, and was adjusted to the surveys July 21st, 1885, nearly
196 one year after settlement by said preemption claimants.

2. The record contains duly executed powers of attorney from the scripee and her husband to F. W. Eaton, giving him the full power to do all acts necessary "to perfect and secure a permanent and bona fide location" of the scrip.

3. Eaton, under said authority employed another to go upon the land and make suitable improvements, giving directions what improvements
197 to make and how to make them, which improvements were made for Eaton, and for the purpose claimed by him.

4. The scripee, in her complaint, while stating that she did not know Eaton and never authorized him to make improvements on these lands, admitted that she parted with the scrip and signed powers of attorney shortly before the location. She did not appear at the hearing to testify in support of the charges made by her.

198 5. She has never asked that the locations be cancelled and that the scrip be returned to her, but, on the contrary, she between the date of her complaint and the day of hearing did execute and deliver a deed of confirmation, acknowledging, ratifying and confirming all that had been done by Eaton as her attorney.

On these findings of fact, the local officers concluded that "there is nothing in evidence to

show that this scripee was misled or imposed upon by the defendant or his agents, or to controvert the fact that the scrip locations were effected in strict conformity with the usual accepted practice in such cases, and in accordance with law and the rules of the Land Department."

They accordingly held, in effect, that contestants had failed to make a case, and that the scrip locations should stand. 199

From that action contestants Hyde and McDonald appealed to your office, assigning six specifications of error, viz:

1. The register and receiver were without authority to decide the cause, and could only properly report the case with their opinion upon the facts to your office.

2. This so-called decision was contrary to the evidence. 200

3. It was contrary to the law.

4. It treated the case as if the controversy was between the scripee and her attorney in fact, whereas it grew out of contest by third parties, who claim to have shown that the scrip was fraudulent on the part of both the scripee and her grantees.

5. The local officers in their so-called decision failed to pass upon the vital question in the case, viz: Whether the land contained improvements made by or under the personal supervision or direction of the scripee, and for her personal use and benefit. 201

6. They erred in finding that a confirmatory deed made between two of the parties to a fraudulent entry could bar the right of subsequent bona fide applicants.

Pending these proceedings on appeal, to-wit: April 28th, 1887, Fred F. Huntress filed in the local land office applications to contest not alone the scrip locations, as your office seems to have assumed, but also the preemption claims of Hyde and McDonald. Said applications were by the
202 local office transmitted to your office, which under date August 30, 1887, returned them to the local office, with instructions that they be held subject to the final disposition of the case at bar. They have since been returned to the department and are now in the record before me.

Your office decision, proceeding to a review of the facts disclosed by the record, found that accompanying the scrip and applications to locate the same were what purported to be the original
203 powers of attorney, given May 25th, 1883, by the scripee and her husband, to Frank W. Eaton; that with each application was an affidavit by said Eaton, setting out that he under said powers of attorney had caused to be built upon each of the tracts upon which the scrip was located a house, 14 by 16 feet, one story high, of timber, covered with split shingles, with doors and windows; that he also had cleared one-half acre of each tract, and that said improvements were made
204 under the personal direction of the scripee, and for her personal use and benefit.

Your said office decision further recites that in the record are what purport to be original powers of attorney given by the scripee and her husband to Leonidas Merritt, granting him full power and authority to enter upon and take possession of any and all pieces or parcels of land in the State of Minnesota, which they then owned or might thereafter acquire, or become interested

in, by virtue of the location of the scrip in question; to prosecute and defend any suit at law in the courts of said State, and to grant, bargain, sell, demise, lease, convey and confirm said land, or any part thereof, by deed, conveyance, demise or lease, in the same manner as if performed by them individually. 205

Your said office decision further recites that in the record are certified copies of two warranty deeds, dated July 2d, 1883, and executed by said Leonidas Merritt, in the name of the scripee and her husband, under and by virtue of the power of attorney above mentioned, convey ing to Edward Byrne, James H. Powers and Joseph Clement, an undivided one-third interest in and to all land embraced in said scrip locations and involved in this controversy,—the considera- 206
tion named in each being $25,000.00; that there are also in the case certified copies of two warranty deeds, bearing date July 6th, 1883, executed in the same manner by the same parties of the first part, conveying to Frank W. Eaton an undivided two-thirds interest in and to the same tracts of land, the consideration named in each being $25,0000.00; that Joseph Clement, one of the grantees of an undivided one-third interest, above mentioned, on August 28th, 1883, as appears by certified copies 207
of two deeds of warranty on file, conveyed to one Nicholas Lansterf his undivided one-ninth interest in and to said tracts, the consideration named in each being $250.00; that on the next day (August 29th, 1883,) as shown by certified copies on file, James H. Powers, another of the grantees of an undivided one-third interest, executed two similar deeds conveying to said Lansterf his undivided one-ninth interest in and to said tracts

the consideration named in each deed being $350.00.

Your office decision also mentions certain quit claim deeds (certified copies of which are in the record), executed and given by the several parties (except Clement), who made the above mentioned
208 warranty deeds, the pupose of the quit claim deeds being to correct imperfect descriptions in the prior warranty deeds, which together embrace all the land covered by the scrip locations.

As a result of the conveyances above recited, your office decision, finds that such title as passed under said conveyance now rests as follows:

Two-ninths interest in Nicholas Lansterf by conveyance from Powers and Clement. One-ninth interest in Edward Byrne under original con-
209 veyance from Merritt, as attorney in fact for the scripee, with power to sell; two-thirds (six-ninths) interest in Frank W. Eaton, under conveyance from Merritt, as attorney in fact.

Your office then holds that "these several deeds of conveyance and release conformed no greater title upon the grantees than the grantors had, which was simply a right to these tracts of land, subject to the final adjudication and appro-
210 val of these locations."

It then makes reference to the fact disclosed by the record that prior to the hearing before the local office, to-wit, on March 31st, 1886, the scripee and her husband joined in a deed of confirmation, ratifying and confirming all and singular the acts of Frank W. Eaton and Leonidas Merritt, relative to the tracts in question, done and performed by them under the respective powers of at'orney, given as hereinbefore described.

Proceeding, then, to a consideration of the testimony taken at the hearing, your office decision finds that it "establishes by a clear preponderance the fact that said Eaton by virtue of his power of attorney employed Edward Byrne to make the improvements upon the respective tracts in question, and that Byrne secured the services of Powers and Clement to assist him in the matter," that Eaton admits that the power of attorney under which he acted was executed by the scripee in blank; that he never saw the scripee until March 31st, 1886, never saw the land, and did not know whether said scripee ever saw it or not; that the deed of confirmation by the scripee appears, so far as she and Eaton are concerned, to remove any objection to the acts previously performed by the latter, under and by virtue of his said power of attorney; that the affidavits accompanying the location of said scrip appear to fulfill the requirements of the circular of May 28th, 1878 (5 C. L. O., 126).

211

212

This would seem on its face to point to an adjudication in favor of the scrip locations; but your office decision further proceeds to say that the only other question left to pass upon touching the legality to these locations, is, whether the power of attorney given by the scripee to Frank W. Eaton, by virtue of which he made the locations, could carry with it, under the law; the power and authority to make the improvements, which were necessary as a prerequisite to valid location on the scrip on unsurveyed land. On this question your office decision concludes, that since the evidence shows clearly that the scripee in this case never saw the land, or the improvements, or had

213

anything whatever to do therewith, and since the circular referred to, supra, requires that the Indian shall have a direct connection with the land, and claim the same for his or her personal use, the scrip locations are not valid and should be cancelled, as speculative and made with an evident
214 intent to evade the law, rather than to comply in good faith with legal requirements.

Upon a careful examination of the entire record, I find the facts to be substantially as stated by your office decision and outlined herein.

Epitomized, they are as follows:

The scripee disposed of her scrip, surrendering possession thereof to some one now unknown. Said scrip was accompanied by two powers of attorney, executed in blank, one giving authority
215 to some one not then named to locate the scrip; the other, giving a like authority to sell the land located upon. The scrip, after many years and after passing through several hands, lodged in the hands of Frank W. Eaton, who thereupon filled up the blanks in the power of attorney to locate, inserting his own name as that of attorney in fact for such purpose. He employed others to make slight improvements on the lands in question (then unsurveyed) and after such improve-
216 ments, which were scarcely deserving of the name, he located the scrip as attorney in fact for Orillie Stram, the scripee.

The blanks in the other power of attorney (that to sell) were filled up by inserting the name of Leonidas Merritt, who it appears was a business partner of said Frank W. Eaton, and said Merritt, as attorney in fact of the scripee, executed certain warranty deeds, tranferring and passing title to the lands covered by the scrip lo-

cations to certain parties therein named, it appearing that said parties were Eaton, who had made the locations, and three men, Edward Byrne, James H. Powers and Joseph Clement, who had been by him, or through his agency, employed to make the improvements above mentioned.

Money consideration was expressed in said deeds, but it is apparent from the evidence that the real consideration, so far as Byrne, Powers and Clement were concerned, was what they had done in making the improvements. They got an undivided one-third interest. The residue went to Eaton. 217

The scripee never saw the land. At the date of the location she had never seen Eaton, who acted as her attorney in fact, and did not then know that there was such a person in existence. She had, as a matter of fact, sold the scrip long prior to the location, and had no personal interest in the land, nor were the improvements made for her personal use and benefit. It was a matter of no moment to her where the scrip was located, or whether it was located at all or not. Her actual interest in the matter ceased when she disposed of the scrip. It was admitted by her so-called attorneys in fact that she was to have no interest in the land. For a long time she directly and positively repudiated Eaton and Merritt as her attorneys in fact, denying that they acted for her in any capacity whatever. Afterwards and but a few days prior to the hearing, she ratified by deed what had been done by them. 218 219

This ratification, it is evident, was procured at the solicitation of Eaton or Merritt, or both, and for a consideration. But such ratification does not change the fact that the improvements

and location, though made under the guise of a power of attorney, were made, not under the direction and in the interest of the scripee, but for the benefit solely of another not even known to the scripee, viz: Eaton, who had inserted his name as attorney in the power executed in blank. If
220 the location of the scrip was illegal and invalid, then the deed of ratification could not give it validity—could not vitalize that which originally had not in it the germ or essence of legal vitality.

This case is in all essential particulars like that of Joseph W. Allen, et al., vs. Lewis Merrill, et al., decided by me this day, 8 L. D., 207—review denied, 12 L. D., 138, so far as the method of making the scrip locations is a matter of concern and the reasons of that case are in this particular ap-
221 plicable to this. Following the ruling of that case, I must hold that the scrip locations here in question are invalid, and your office decision so holding is affirmed.

There remain for disposition the rights of Hyde and McDonald. It is asserted that the case is not in such a position that any determination ought to be made as to these claims, and that must be determined by a view of the record and proceedings taken.

222 It appears that on the 9th day of October, 1884, Hyde filed with the Register a paper addressed to the Register and Receiver, in the caption described as being "An application for leave to contest the pretended entry, with Sioux half-breed Certificate No. 19 E., for one hundred and sixty acres, issued to Orillie Moreau, on November 24th, 1856, and attempted to be located on the following described land, to-wit: "describing the land, and that in that application, after the alle-

gation attacking the location, the following appears:

"That said contestant is a single man over 21 years of age, and has declared his intention to become a citizen of the United States, that he does not own 320 acres of land in any State or Territory, that he has not left land of his own in this 223
state to reside on the public land, and that he has never heretofore exercised his right under the preemption law.

"That heretofore, to-wit: on the 20th day of August, A. D., 1884, the said contestant made settlement on the said described land with a view to inhabiting and cultivating the same for his own exclusive use and benefit, and intends to make his Declaratory Statement for said land under the Preemption Laws of the United States as soon 224
as the surveyed plat of township 63, N. of range 11, W. of 4th P. M., shall be returned to the United States Land Office at Duluth, Minn.

"Wherefore your petitioner requests that this contest may be granted and a day set for the hearing thereof."

Attached to this application was an affidavit of verification, sworn to on the 29th of September, 1884.

225

This application is stated, in the Commissioner's order for a hearing, hereinafter mentioned, to have been transmitted by the Register of the General Land Office October 31, 1884, and to have been supported by a copy of an affidavit of the scripee, which has been before spoken of.

On the 20th day of July, 1885, Hyde made application to file the Declaratory Statement previously mentioned in this opinion, which was re-

jected, and thirty days allowed by the Register for appeal. On the 25th day of August, 1885, the Register transmitted Hyde's appeal from that decision, to the General Land Office.

All the proceedings on the part of McDonald in respect to the land claimed by him correspond
226 exactly with those of Hyde as to the land claimed by him; and were made by the same attorneys, and at the same time respectively.

Afterwards, on the 14th of November, 1885, the Commissioner of the General Land Office, by letter "C" of that date, ordered a hearing, in which, after reciting the allegations for and against the validity of the scrip, he proceeds:

"In view of the conflicting statements respect-
227 ing the legality of these locations, I deem it proper that a hearing should be held, that the respective parties may have an opportunity to submit such proof as they may have in support of their allegations, and that this office may be possessed of all the facts possible in the matter; and the same is hereby ordered.

"You will notify all parties in interest of the time and place of hearing, and at the proper time thereafter you will transmit to this office the testi-
228 mony taken thereat with your opinion thereon."

Under this order of the Commissioner, when the hearing came to be held, it seems to have been assumed by all parties that the rights of Hyde and McDonald as pre-emptors were involved; and voluminous testimony was taken, not only with respect to the rights of the scrip locators but with respect to the rights of the pre-emptors. Upon the conclusion of the hearing, the Register and Receiver, being of the opinion that the scrip loca-

tions were valid, disposed of the pre-emptor's claims as follows:

"The bona fides of Hyde and McDonald or their rights under the pre-emption law need not be considered here, as the question of their claims is contingent upon their ability to set aside the scrip locations, and thus render the land subject 229
to pre-emption settlement.

Upon this showing of fact, we conclude that the contestants have failed to make out a case, and that the proceedings should be dismissed. It is so ordered.

The decision of the Assistant Commissioner makes no allusion to the contest in regard to Hyde and McDonald, simply reversing the decision of the local officers, as to the validity of the scrip location. 230

Upon examination of the testimony taken at the hearing the following appears in the examination of Hyde:

Q. Did you have any contract with Mr. White in writing or otherwise, by which he was to receive any compensation of interest in the land? A. Yes, there was a contract.

Q. Where is it? A. I don't know.

Q. When and where did you last see it? A. I have not seen it since it was drawn up by Mr. 231
White.

Q. What did it contain? A. It contained that, when I proved up, I was to secure him a one-half interest.

McDonald testified as to the land covered by his pre-emption claim:

"Judge White has no interest in it. There is an understanding that he is to have an interest

in it if we succeed in this trial; he is to have a half interest. * * * The arrangement with Hyde is the same as mine. White is to have half if we succeed in this. James H. Power is also to have an interest in it if we succeed. I don't know how much he is to get. I agreed to give him an interest
232 if we succeeded in getting the land."

He further testified:

"Mr White is paying the expenses of the claim with the understanding that he is to have half of it after we secure it."

Again—

"I am to let him have an interest in the land when I get it to pay him for his time and services. The contract I have with Mr. White for his one-half is in writing."

233 When asked how he could give White a half interest, unless he should deed to him one-half, he answered: "I could not very well."

White, when put upon the stand, testified that after diligent search he was unable to find the contract.

Further evidence than that above quoted from the testimony of Hyde and McDonald is unnecessary to show that they have, by the contracts which they admit having made, disqualified
234 themselves from taking the land under the pre-emption law.

Counsel, in one of the briefs in the case, aver as to McDonald that the records of your office will show that he has already exhausted his pre-emption right by having made a pre-emption filing, and, having filed a formal relinquishment of this claim thereunder. I have not attempted to test the correctness of this averment by an in-

spection of the records of your office. It is deemed unnecessary in view of the testimony of Hyde and McDonald, the pre-emption claimants, as to their contract to sell.

The testimony of the two claimants establishes beyond question that the statements made in their application to contest, that their settlements were made wholly for their own use and benefit, was not well founded, and that it would be impossible for either of them to made the affidavit required by section 2262 R. S., "that he has not, directly or indirectly, made any agreement or contract, in any way or manner with any person whatever, by which the title which he might acquire from the government of the United States should inure in whole or in part, to the benefit of any person except himself." 235 236

In view of this record and proof, it appears to be the duty of the Department to dispose of these claims of pre-emption. A hearing has been had upon the validity of them, in which the evidence was adduced fully, and upon which the material facts appear to have been sufficiently elicited to leave no doubt. Whatever rights they might have established would, under a familiar rule of the department, have been regarded as fixed at the time when they made their application to file. Their application to file must be treated as if they had been allowed, subject to the rights of others, and it now appears that they ought to be cancelled, if filed. Their appeal (which is sent up in the record) from the rejection of their applications, appears to bring the whole matter before the department; and in the exercise of the power of supervision vested in the department by law, it seems to be demanded that upon this disclosure 237

of facts the proper action should be taken. If there had been no hearing upon this question, the proper action would be, upon a suggestion of such information, to direct a hearing to be had; but inasmuch as a hearing has been had and as the testimony which shows the absolute impossibility of
238 perfecting a pre-emption title in these claimants has proceeded from themselves, testifying under oath, there appears no reason for directing a further hearing.

If their Declaratory Statement were now to be filed as of that date, the duty would rest on the Department to cancel them, in accordance with the ordinary practice in such cases.

This leaves to be considered one other branch or feature of the case as now presented by the
239 record. On April 28th, 1887, one Fred T. Huntress filed formal applications to contest the pre-emption claims of said Hyde and McDonald, respectively, his charge being that said claims were initiated not in good faith to appropriate the lands to their own exclusive use, but for speculative purposes, they having agreed to convey title to other parties when procured by them.

Huntress, in his affidavits of contest, asks that a hearing be ordered to enable him to sub-
240 stantiate by competent proof the charges made.

Counsel for Huntress, however, argues in a brief recently filed that further hearing is unnecessary, and that the asserted claims of Hyde and McDonald may properly be rejected and finally disposed of on the record as it now exists.

It is therefore asked that such action be taken and the scrip locations, as well as the pre-emption claims of said Hyde and McDonald being disposed

of and the record cleared of any claim to the land, that he (Huntress) be accorded the preferred right of entry on said lands.

Notwithstanding the foregoing judgment to some extent was anticipated by the petition, this proceeds on the record all of which had been made up before Huntress came into the case as a 241
pretended contestant, and was in no way or manner aided by what he did. His acts had nothing whatever to do with bringing about the rejection of either the scrip claims or those of Hyde and McDonald. Besides, an application to file a declaratory statement is hardly subject to contest. He is, therefore, in no position to claim a preferred right of entry as a successful contestant, and his application to be so considered and treated must be denied. This disposes of all the claims, 242
and asserted claims to the land, so far as disclosed by the record before me, and leaves the land in question open to disposal under the public land laws of the United States applicable thereto, and such is the judgment of this Department.

The papers in the case are herewith returned.

Very respectfully,

WM. F. VILAS, Secretary.

243

EXHIBIT B.

This indenture made this 31st day of March in the year of our Lord one thousand eight hundred and eighty-six between Orillie Stram (before marriage Orillie Moreau) and Roman Stram, her husband, of Crawford County and State of Wisconsin, parties of the first part and Frank W.

Eaton of Duluth, St. Louis County, State of Minnesota, party of the second part.

Witnesseth, that whereas the said Frank W. Eaton, as our duly constituted and appointed attorney in fact did on the 16th day of June, A. D. 1883, caused to be filed in the U. S. Land Office at
244 Duluth, Minnesota, an application for certain lands and Sioux half-breed scrip No. 19 D. and No. 19 E., each for 160 acres of land, thereby by virtue of the laws of the United States and conditions precedent which had been complied with by the said Frank W. Eaton our attorney in fact as aforesaid vesting the title to the said land as described in said application by metes and bounds in me the said Orillie Stram (the said description being by metes and bounds for the reason that the
245 said land had not yet been surveyed by the United States) which said land has since been surveyed by the government and a plat thereof filed in the United States Land Office at Duluth, Minnesota and upon said plat the aforesaid scrip and entry was adjusted July 21st, A. D. 1885, thereby specifically and perfectly describing the land filed upon for me the said Orillie Stram by the said Frank W. Eaton and intended to be entered on June 15th, A. D. 1883, in the name of the said Orillie Stram
246 by our attorney in fact, the said Frank W. Eaton, and,

Whereas, we, the said Orillie Stram and Roman Stram did on the 25th day of May, A. D. 1883, by two certain powers of attorney, duly executed, acknowledged and delivered by us to Leonidas Merritt of Duluth, St. Louis County, State of Minnesota, which said powers of attorney were duly recorded in the office of the Register of Deeds for St. Louis County, Minnesota, in Book "A" of

Powers of Attorney on pages 613 and 614, therein and thereby constituting and appointing the said Leonidas Merritt the attorney in fact of the said Orillie Stram with full power and authority in her name and stead to grant, bargain, sell, demise, lease, convey and confirm the said lands which we then owned or which we might thereafter acquire or become seized of under and by virtue of locations of Sioux half-breed scrip No. 19 E. for 160 acres of land and No. 19 D. for 160 acres of land issued to me the said Orillie Stram, and, 247

Whereas, the said Leonidas Merritt as our attorney in fact on the 30th day of October, A. D. 1885, did by warranty deed duly executed by him convey to the said Frank W. Eaton an undivided seven-ninths, part and interest in said lands, which according to the said survey and plat and 248 in said deed are described as follows, to-wit: "All of the following pieces, parcels and tracts of land situate in the Counties of St. Louis and Lake in the State of Minnesota, described as follows, to-wit: Lots one (1), two (2), three (3), five (5) and six (6), the southwest quarter of the northeast quarter, the southeast quarter of the northwest quarter of the northwest quarter and the northwest quarter of the southeast quarter, all being in section thirty (30) in township No. sixty-three 249 (63) north of range eleven (11), west of the 4th principal meridian in Minnesota, containing according to the government survey, three hundred thirteen and 61-100 (313.61) acres of land more or less, which said warranty deed was upon the 3rd day of November, A. D. 1885, at 2 o'clock P. M., duly recorded in the office of the Register of Deeds for St. Louis County, Minnesota, in Book A 3 of Deeds, page 350, and in the office of the

Register of Deeds for the County of Lake in the State of Minnesota on the 5th day of December, A. D. 1885, at 3 o'clock P. M., in Book D. of Deeds, page 205. Now, therefore, we the said Orillie Stram and Roman Stram, parties of the first part, do hereby fully ratify and confirm the said conveyance of said land as above described to the
250 said Frank W. Eaton by our said attorney in fact, the said Leonidas Merritt and do hereby and herein fully ratify and confirm all and every act, conveyance made and matter and thing done by our said attorney in fact, Leonidas Merritt, under and by virtue of the said power of attorney as aforesaid. For the purpose of more effectually ratifying and confirming the acts of our said attorney, Leonidas Merritt, and in consideration of the sum
251 of one (1) dollar to us in hand paid by the said party of the second part and receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold and conveyed and by these presents do grant, bargain, sell and convey unto the said Frank W. Eaton, party of the second part, his heirs or assigns forever an undivided seven-ninths part and interest in the following described tracts, pieces or parcels of land situate in the Counties of St. Louis and Lake and State of Minnesota, known and described as follows, to-wit:

252

Lots one (1), two (2), three (3), five (5) and six (6). The southwest quarter of the northeast quarter, the southeast quarter of the northwest quarter and the northwest quarter of the southeast quarter, all being in section thirty (30) in township No. sixty-three (63) north of range No. eleven (11), west of the 4th principal meridian in Minnesota, containing according to the govern-

ment survey three hundred thirteen and sixty-one hundredths (313.61) acres more or less.

To have and to hold the same together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining to the said party of the second part, his heirs and assigns forever and the same parties 253
of the first part for their heirs, executors and administrators, do covenant with the said party of the second part, his heirs and assigns forever, that they are well seized in fee of the said land and premises aforesaid, and have good right to sell and convey the said land in manner and form aforesaid and that the same is free and clear from all incumbrances; and the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, 254
against all persons lawfully claiming or to claim the whole or any part thereof the said parties of the first part will warrant and defend.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

ORILLIE STRAM, (Seal.)
Formerly Orillie Moreau.

ROMAN STRAM.

Signed and delivered in 255
presence of
JAC. RAFFAUF.
ALEX. RAFFAUF.

STATE OF MINNESOTA, COUNTY OF CRAWFORD—

I, Jac. Raffauf, a notary public within and for said County do hereby certify that on the 31st day of March, A. D. 1886, personally came before me Orillie Stram, formerly Orillie Moreau and Roman
256 Stram, her husband, to me well known to be the same person described in and who executed the foregoing instrument and they acknowledged that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

JAC. RAFFAUF,
(Seal.) Notary Public,
For Crawford Co., Wisconsin.

---

257 STATE OF MINNESOTA, COUNTY OF ST. Louis.—ss. District Court, Eleventh Judicial District.

THE MIDWAY COMPANY, Plaintiff,

vs.

FRANK W. EATON, ET AL., Defendants.

258

MEMORANDUM.

The vital question in this case relates in my judgment, to the location of the scrip of Orillie Stram, nee Moreau.

Was the location of such scrip valid? If this question is answered in the negative the case must be determined in favor of plaintiff, if the answer be in the affirmative the defendants must prevail.

The Honorable Secretary of the Interior in his dicision, under date of February 18th, 1889, (a copy of which is attached to the Findings of Fact in this case), held such location INVALID.

Was the Honorable Secretary in error in so holding?

The scrip in question was issued to Orillie Stram nee Moreau, under the Act of Congress of July 17th, 1854, (10 Stat. p. 304). 259

Such scrip might be located upon any unoccupied land subject to pre-emption or private sale, but it was expressly provided by said Act that, no transfer or conveyance of such scrip should be valid.

The provision contained in the Act being as follows: "No transfer or conveyance of any of said certificates or scrip shall be valid." It will be observed that alienation of the land, acquired by the location of the scrip, is not, in express terms, prohibited. That there is a marked distinction between prohibition of alienation of the scrip and prohibition of alienation of the land acquired by the location of the scrip seems clear. 260

The Supreme Court of the United States in Myers vs. Croft, 20 L. C. P. Co., pg. 562, recognizes this distinction. I am of the opinion that the provision cited did not prohibit the alienation of the land to be acquired by location of the scrip. Was the location of the scrip under the power of attorney to Eaton valid? 261

It will probably be conceded that had there been nothing further in this case than a power of attorney to Eaton to locate the scrip, and had Eaton proceeded under such power to locate the land in question, for and on behalf of Orillie

Stram nee Moreau and for her use and benefit alone, that such location would have been valid and that said Stram would have been entitled to her patent in due course from the United States. It is claimed, however, that by reason of the fact, that another power of attorney was given to Merritt, authorizing him to convey that land acquired
262 under the scrip location made by Eaton, in the name of Stram, and that by reason of the fact that, under the agreement, the scrip as located was not to inure to the benefit of Stram, that such facts rendered such location invalid and that Stram herself therefore acquired no legal right to the property, and that the Land Office Department upon the facts being brought to its attention, had the right, and it was its duty to cancel such scrip
263 location and declare the lands open for entry without regard to such scrip location. In order to determine this question it is necessary to get at the object of the prohibition of alienation of the scrip, contained in the Act of 1854. There being no prohibition against alienation of the land, it would seem that it could not have been for the protection primarily of the half-breed, but must have been for the protection of the government itself. The
264 government had agreed to give scrip which might be located on certain lands; if the scrip were made assignable the Land Office might have been constantly involved in settling questions as to whether or not any assignment of the scrip had, in fact, been made; if the scrip were made unassignable no such dispute could arise as in every case, the land, itself, would be entered in the name of the original owner of the scrip, thus accomplishing the purpose of the law to effect and exchange

of lands with the half-breeds. After the land was located in the name of the original scripee, it could be no concern of the government as to what became of it, for no provision was made in the law concerning it, but the scripee was left as a free agent to handle the land as best suited him. The prohibition against alienation prevented any transfer or conveyance of the scrip itself. This was not permitted to be done directly, and it follows that it could not be done indirectly. It would seem therefore that if the power of attorney to Eaton to locate, together with the power of attorney to Merritt, to convey any lands acquired under the scrip located by Eaton, coupled with the fact that under the agreement Stram had no further interest in the scrip or the land to be located thereunder, amounted to a transfer or conveyance of the scrip itself that such transaction was illegal and within the prohibition of the statute and void. In the case of Felix vs. Patrick, 145 U. S. (Sup. Court Reporter) pg. 862 et seq., the court says:

265

266

"The device of a blank power of attorney and quit claim deed as doubtless resorted to for the purpose of evading the provision of the Act of Congress that no transfer or conveyance of the scrip issued under such Act should be valid. This rendered it necessary that the scrip should be located in the name and for the benefit of the person to whom it was issued; but from the moment the scrip was located, and the title of the land vested in Sophia Felix, it became subject to her disposition precisely as any other land would be. In order therefore for the purchaser of this scrip from Sophia Felix to make the same available, it

267

became necessary to secure a power of attorney or a deed of the land.

"As the bill alleges that Patrick obtained possession of these instruments while still in blank, he is clearly chargeable with notice that they were intended as a device to evade the law
268 against the assignment of scrip."

"Having then no right to locate the scrip for his own benefit, he must be deemed to have located it for Sophia Felix, and as her representative."

This case seems to assume that the location WAS VALID, but that the quit claim deed, being a device to evade the prohibition of the Act of Congress, was ineffective to pass the title to Patrick and that he was, therefore, a trustee for Felix. In the case at bar, conceding the power of attor-
269 ney to Merritt, to have been a device for evading the prohibition against the transfer or convevance of the scrip, would not the only result be to place the title to the land in Orillie Stram? The power of attorney to locate was, in and of itself, a perfectly legal instrument, not transgressing either in spirit or letter the prohibition contained in the statute. How then can it be said that because the parties executed another and independent instrument, which was intended to evade the pro-
270 hibition, that it rendered the first and otherwise valid instrument invalid? The land WAS located under a valid power; not even subject to a parol explanation, Gilbert vs. Thompson, 14 Minn., pg. 414, Gil.

Title was obtained to the land under such scrip location in the name of Orillie Stram nee Moreau, all that the government ever contracted should be done. Who was injured? Clearly not Stram, because she gave a power to locate

and affirms that she wanted the land. Certainly not the government for it had agreed to give Stram certain land for the scrip and had carried out its agreement.

But the plaintiff urges that Stram had given a power of attorney to convey the land and had no further interest in the land, therefore her lo- 271
cation was invalid. Under the doctrine announced in Patrick vs. Felix, giving it the most liberal construction that can be urged, the power of attorney to convey was invalid and of no force and effect and without regard to what the parties intended or attempted to do the equitable title was still in Stram. Suppose that the transaction in this case had been as follows: Stram gave a power of attorney to Eaton to locate the scrip and at the same time, by parol, agreed that as soon as 272
the scrip was located she would give to Eaton a deed to the land so located that the consideration for such parol agreement was the sum of $500.00 in hand paid, and that Stram under such parol agreement had agreed that she neither had not claimed to have any further right, title or interest either in the scrip or the land to be located thereunder. Pursuant to such agreement the scrip was located: Upon contest it was made to appear that such a parol agreement had been entered 273
into between Stram and Eaton.

Would it in any way invalidate the scrip location which was made under a power regular upon its face. Clearly the parol agreement has no effect, for it was void under the statute of frauds and no evidence of it could be received. How could it affect the power to locate? Is there under the doctrine announced in Felix vs. Patrick any distinction to be drawn between an oral agree-

ment to convey and one evidenced in writing so far as it affects the location of the scrip. The oral agreement is void for two reasons:

1st. The Statute of Frauds.

2nd. It being an attempt to evade the prohibition against alienation contained in the Act of
274 Congress.

The written agreement is void for but one reason, viz: The prohibition of the Act of Congress:

It is a rule so well known as to need no citation of authority that the valid acts of parties will always be upheld, and that where an instrument contains provisions some valid and some invalid that full force and effect will be given to the valid provisions and that those held invalid will be dis-
275 regarded as of no force or effect; treated as mere surplusage. This rule of construction always obtains unless the valid and invalid provisions are so intimately related as to be incapable of separation, in which case the whole instrument must fail.

In the case at bar we have:

1st. A power of attorney to Eaton to locate the scrip,—standing alone its validity is conceded.

2nd. A power of attorney to Merritt to con-
276 vey certain lands to be secured under the scrip location, coupled with a paroi agreement, that the principal shall have no further interest in either the scrip or land.

It is apparent that after the scrip is located in the name of the scripee, that she has no further interest in the scrip. By the act of location the scrip becomes the property of the United States and its contract is cancelled. Nothing then re-

mains but the land. In relation to this the scripee has made an agreement (power of attorney) which is of no force or effect. Her attempt and Eaton's attempt to avoid the prohibitory portion of the Act of Congress are unavailing, the title still remaining under the law in the scripee. She needs no protection for the law gives it to her fully and 277
absolutely. The government needs no protection for it has given what it contracted to give. The scripee not needing the good offices of the government, and the government not having been in any way imposed upon, the need for its services in the matter is at an end, and it has merely the clerical duty of issuing to the scripee her patent in the usual course of business.

It is true that the government might have said upon all the facts presented that "Stram and 278
Eaton TRIED to avoid one of the provisions which I had made relative to the scrip, which I issued to Stram, but owing to the law of the land as announced in Felix vs. Patrick, the attempt was a signal failure and I have no further interest in the matter. Stram has her land, the power of attorney to Merritt and the deed to Eaton to the contrary notwithstanding.

I have my scrip and the contract oringinally made by me is settled. This being so I now rele- 279
gate Orillie Stram to the courts in common with all other of my citizens."

In my judgment the Honorable Secretary of the Interior erred in holding such scrip location invalid. As a matter of law he should have awarded the land in controversy to Orillie Stram nee Moreau. As Orillie Stram nee Moreau has given a subsequent deed of the premises in controversy to Eaton and as it is conceded that Eaton and his

grantees hold whatever title Orillie Stram nee Moreau may have had, it follows that the plaintiff's cause of action fails and that judgment should be entered in favor of the defendants.

It has accordingly been so ordered.

S. H. MOER, Judge.

280 Endorsement of the original filed in my office at .... o'clock ...M., Dec. 27, 1899.

GEO. F. CHESTER,
Clerk of District Court.
By A. J. TAYLOR, Deputy.

STATE OF MINNESOTA, COUNTY OF ST. Louis. District Court, Eleventh Judicial
281 District.

THE MIDWAY COMPANY, Plaintiff,

vs.

FRANK W. EATON, LEONIDAS MERRITT, RICHARD H. FAGAN AND MERRILL M. CLARK, Defendants.

282

It is stipulated and agreed by and between the parties to this action, that immediately upon and after the filing of the Findings of Fact and Conclusions of Law by the Court herein, that application may be made to the Court for further findings if deemed necessary by either party hereto without notice to the other parties and may also in like manner move for a new trial herein. The object of this stipulation is to insure what either

party hereto shall deem full and complete Findings or Refusals to find by the judge who tried said cause, and whose term of office expires on or about the 1st day of January next.

Dated Dec. 23rd, 1899.

WALTER AYERS AND
P. H. SEYMOUR, 283
Attorneys for Plaintiff.

J. L. WASHBURN AND
W. D. BAILEY,
Attorneys for Merritt, Clark & Fagan.

FRANK CUTTING,
L. C. HARRIS AND
TOWNE & HARRIS,
Attorneys for Frank W. Eaton.

PHELPS & McCLINTOCK,
AND WM. B. PHELPS, 284
Attorney for Margaretha Lonstorf.

STATE OF MINNESOTA, COUNTY OF ST. Louis.—ss. District Court, Eleventh Judicial District.

THE MIDWAY COMPANY, Plaintiff, 285

vs.

FRANK W. EATON, ET AL., Defendants.

STIPULATION.

It is stipulated, that the annexed is a full, true and correct copy of the evidence, and all thereof, introduced upon the trial of the above

cause, and a full and correct record of all of the proceedings had upon said trial, including the rulings of the court. The right to make proposed amendments thereto is hereby waived and the annexed may be allowed and settled by the court without notice as the case in the above entitled
286 cause.

WALTER AYERS AND,
P. H. SEYMOUR,
Attorneys for Plaintiff.
J. L. WASHBURN AND
W. D. BAILEY,
Attorneys for Merritt, Fagan & Clark.
TOWNE & HARRIS,
Attorneys for Frank W. Eaton.
WM. B. PHELPS,
287 Attorney for Margaretha Lonstorf.

STATE OF MINNESOTA, COUNTY OF ST. Louis.—ss. District Court, Eleventh Judicial District.

---

288 THE MIDWAY COMPANY, Plaintiff,

vs.

FRANK W. EATON, ET AL., Defendants.

TESTIMONY AND RECORD OF PROCEEDINGS HAD ON TRIAL.

This cause coming on for trial at the Regular June Term of the District Court of the Eleventh

Judicial District of the State of Minnesota, held at the Court House in the City of Duluth, within and for the County of St. Louis, and state aforesaid, on the 12th day of June, A. D. 1899, before—HONORABLE S. H. MOER, Judge, without a Jury.

Walter Ayers and P. H. Seymour appearing as 289
attorneys for plaintiff; Washburn, Lewis and Bailey appearing as attorneys for Merritt, Clark and Fagan; L. C. Harris and Frank Cutting appearing as attorneys for F. W. Eaton; W. B. Phelps appearing as attorney in behalf of defendant Lonstorf.

Testimony is introduced and proceedings are had herein as follows:

The corporate character of the plaintiff and its 290
grantors, The Germania Iron Company, is admitted.

MR. AYERS:

I offer in evidence from the original records of St. Louis County,—the same being admitted for the purpose of this action to be now here in open court,—the record of a patent from the United States Government to Frank Hicks, bearing date the tenth day of May, 1898, recorded in Book D of Patents in the Office of the Register of Deeds of St. Louis 291
County on the 18th day of February, 1899, at page 269. Conveying to the patentee lots numbered 3, 5 and 6 of section thirty, township sixty-three, range eleven west, in Minnesota.

(Received without objection. Copy page 78.)

MR. AYERS:

It is admitted that these books, parts of which I offer in evidence, are part of the original records

of St. Louis County, in the office of the Register of Deeds?

MR. HARRIS:

As far as that patent is concerned, yes.

MR. AYERS:

To save bringing them up?

292 MR. HARRIS:

Oh, yes, as far as I am concerned. I have no objection.

MR. AYERS:

Is it admitted by all the counsel that these books, parts of which I shall offer in evidence are the original records from the office of the Register of Deeds of St. Louis County, Minnesota?

(It is so admitted.)

293 MR. AYERS:

I now offer Book 136 of Deeds at page 42 of St. Louis County records, being record of a deed bearing date October 21st, 1897, a deed of general warranty, made by Frank Hicks and wife to the Midway Company, conveying the lands in question.

(Received without objection. Copy page 80.)

MR. AYERS:

294 I also offer in evidence from the original records of Lake County, Minnesota, Book J., at page 580, being the record of Register and Receiver's receipt issued by the United States to Frank Hicks for the premises in controversy in this action, bearing date October 20th, 1897.

(Received without objection. Copy page 197.)

I offer in evidence certified copy of the decision of the Secretary of the Interior in the case of

Hyde and McDonald against Eaton and Stram, bearing date February 18th, 1889.

(Received without objection and marked Ex. A.

Copy of Exhibit A. page 12.)

MR. AYERS:

I also offer in evidence certified copies of the 295
testimony of F. W. Eaton and Edward Byrne and of exhibits F. G. C. and H. mentioned in said testimony, in the case of Thomas W. Hyde, et al., vs. F. W. Eaton, et al.

(Received without objection and marked Ex. B.

Copy of Exhibit B. page 32.)

296

PLAINTIFF RESTS.

MR. AYERS:

It is admitted that all of the rights, if any, acquired by any person under the issue of the Sioux half-breed scrip location referred to in the answers, came to and vested in the persons referred to in the answer of Frank W. Eaton in this 297
case in the proportions therein set forth by conveyances direct or mesne. It being the intention of this stipulation merely to avoid the necessity of introducing in evidence the records of the deeds evidencing such conveyances, and to have no other or further effect than if the deeds evidencing any of the conveyances or attempted conveyances, or purported conveyances from the scripee, or any one purporting to act for her, had been offered

in evidence. It not being intended to concede that any rights passed by virtue of such scripee location.

It is further admitted that the conveyances or instruments purporting to be such, hereinbefore in this stipulation referred to, were all duly re-
298 corded in the office of the Register of Deeds of the proper county prior to the issuance of the Register and Receiver's receipt for the lands in controversy to Frank Hicks.

MR. AYERS:

The defendants having declined to take advantage of the proposed stipulation it is hereby withdrawn.

MR. HARRIS:

299 The defendants and all of them offer in evidence A. 3 of Deeds, page 349, being the Receiver's receipt for scrip location 19 D. Lots 1 and 2 and the southwest of the northeast quarter and the northwest quarter of the southeast quarter of section thirty, township sixty-three, range eleven.

MR. AYERS:

Objected to as irrevelant and immaterial.

MR. WASHBURN:

300 In connection with that offer we offer Book D. of Deeds, page 204, from the records of the Register of Deeds of Lake County.

MR. AYERS:

Objected to as irrevelant and immaterial.

THE COURT:

The purpose of this is because you desire to show settlement?

MR. HARRIS:

While we do not deem it necessary, yet as matter of precaution we propose to show possession of these premises happens to be on another portion of this section than the particular premises that are in dispute. But we claim, under the decisions of this court, where a party claims to be 301
in possession, where his possession is notice, that the limit of his possession are defined by the boundaries of his deeds under which he claims. And that is the purpose for which we are introducing it.

MR. AYERS:

As I called your Honor's attention, the question of possession of the premises is not in issue.

MR. HARRIS: 302

Here is a point we are anticipating: Are you claiming at all to be an innocent purchaser—

MR. AYERS:

Oh, no. We knew what the condition of the record was. We knew all about your claims and that may be admitted on the record.

MR. HARRIS:

The only reason,—We set out in our answer that we had been in possession of the premises all 303
this time and our deeds are on record and you have denied that in your reply.

MR. AYERS:

We offer to stipulate these deeds were on record, and we should go further, that we had full knowledge, either actual or constructive, of all those records pertaining to this land being in the Land Office and in the Register's office.

MR. HARRIS:

The question of title is determined upon matter of law whether the Secretary of the Interior ruled rightly or wrongly?

MR. AYERS:

Yes sir. We don't make any question of good
304 faith or bad faith.

MR. HARRIS:

That being a fact that offer is withdrawn, in regard to lots 1 and 2. We offer in evidence A. 3 of Deeds, page 350, being Receiver's receipt for scrip location No. 19 E. and covering lots 3, 5 and 6, and the southeast of the northwest quarter of section thirty, township sixty-three, range eleven west. Filed for record July 21st, 1885.

305 (Received without objection. Copy page 84.)

MR. WASHBURN:

We also offer in evidence the record of the same instrument, Receiver's receipt for the same premises, dated July 21st, 1885, from Book D. of Deeds, page 204, of the records of Lake County: Recorded December 5th, 1885.

(Received without objection.)

MR. HARRIS:

306 We offer in evidence "A" Powers of Attorney, page 613, being power of attorney from Orillie Stram and Roman Stram to Leonidas Merritt, empowering him to locate Sioux half-breed scrip 19 D. Recorded June 22nd, 1883.

MR. AYERS:

That is objected to—

(Offer withdrawn.)

Paper marked Ex. 1.

It is admitted that the powers of attorney, certified copies of which are annexed to exhibit 1 were recorded in St. Louis County on June 22nd, 1883, in A., Powers of Attorney, on pages 613 and 614, the same being recorded prior to July 6th in Lake County.

MR. HARRIS: 307

I offer in evidence warranty deed in A. 3 of Deeds on page 350, given by Orillie Stram and Roman Stram by their attorney in fact, Leonidas Merritt, to Frank W. Eaton, an undivided seven-ninths interest in lots 1, 2, 3, 5 and 6 and the southwest quarter of the northeast quarter, the southeast quarter of the northwest quarter, and the northwest quarter of the southeast quarter, in section thirty, township sixty-three, range eleven west. Filed for record November 23rd, 1885, at 308
2 P. M.

MR. AYERS:

The general objection that it is irrevelant and immaterial. And to all of these deeds, of course, the objection, it will be understood— It is understood that all of these deeds are introduced in evidence subject to the objection that they are irrevelant and immaterial.

MR. WASHBURN: 309

Also in that connection we offer in evidence the record of the same deed from the records of Lake County, Book D. of Deeds, page 205, being recorded in that county on the 5th day of December, 1885. Conveying a seven-ninths interest to Frank W. Eaton.

It is admitted that the deed which is a part of defendant's Exhibit 1 dated the 31st day of March, 1886, and made by Orillie Stram,, formerly

Orillie Moreau, and Roman Stram her husband, to Frank W. *Eaton and covering* all of the property that was located by both pieces of scrip, 19 D. and 19 E., was recorded in Book 8 of Deeds of St. Louis County, on the 3rd day of April, 1886, at ten A. M., and also on the 24th day of April, 1886, in the office of the Register of Deeds of
310 Lake County, in Book D. of Deeds, page 264.

MR. AYERS:

It is admitted that such rights, if any, as were acquired by virtue of the scrip location referred to in the answers in this case, and by virtue of the adjustment of such locations, passed by conveyances mesne or direct, to the various persons and in the proportions set forth in the answer of Frank W. Eaton filed in this court. It being the intention of this stipulation merely to avoid the necessity of introducing the deeds or documents showing the transfers of such asserted rights or claims, and to have no further effect than if such documents or conveyances had themselves been introduced in evidence.

311

MR. HARRIS:

We now offer in evidence Exhibit 1.

Received without objection. Copy page 88.

312

Paper marked Ex. 2.

MR. HARRIS:

I now offer in evidence Exhibit 2.

(Received without objection. Copy page 124.)

MR. HARRIS:

We would like a formal admission as to that question that was,—it is denied in the answer, as to your knowledge of our rights in the premises?

MR. AYERS:

It is admitted that the plaintiff and those under whom he claims full notice or knowledge, either actual or constructive, of the various deeds or other instruments which have been referred to in this case or introduced in evidence as having been recorded in either St. Louis or Lake County 313
prior to the time that it acquired its interest in the land in question.

At this time a recess is taken until 2 p. m.

---

2 p. m.

Case called.

MR. HARRIS:

I will state the object of the testimony we 314
wish to offer. We withdrew certain testimony this morning upon a statement of what counsel would admit, but when he came to make the admission it was not so broad as we had thought the admission was when he made it.

MR. AYERS:

We admit we had full notice of all their claims and rights or asserted rights.

MR. HARRIS: 315

I think your admission is confined simply to notice of the instruments of record. That only admits what has been proved, anyhow. That stipulation as it stands on the record does not admit notice of all of our rights and claims to the land after the decision of the Secretary. Now what we desire to do is this: These deeds we have introduced were all recorded prior to the decision of the Secretary of the Interior. I believe that as

matter of law those deeds are notice of all of the rights that we now possess, but the question might possibly be raised in the court above—

MR. AYERS:

Suppose I admitted we had notice of all of your asserted rights and claims in the same man-
316 ner as if it had been in the actual possession of the land and all of it?

MR. HARRIS:

Yes, with that—

It is admitted by plaintiff that it and its grantors(had notice prior to the time of the conveyance to it of the lands in question of all of the asserted or alleged claims and rights of the defendants, or either of them, to the lands in contro-
317 versy in the same manner as if the lands in controversy and each part thereof had been in the actual possession of the defendants.

Defendants rest.

Plaintiff rests.

Case closed.

318

EXHIBIT A.

(Exhibit A being a copy of Exhibit A annexed to the Findings, is not printed in the paper book.)

COPY OF EXHIBIT B.

"H" H. W. S.

M. C. S. (Ten cent revenue

Doc. 1, Case 681. stamp.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, 319

Washington, D. C.,
April 19, 1899.

I, Binger Herman, Commissioner of the General Land Office do hereby certify that the annexed copies of the testimony of F. W. Eaton and Edward Byrne, and of Exhibits "F," "G," "C" and "H," mentioned in said testimony in the case of Thomas W. Hyde et al. v. F. W. Eaton et al., Duluth Land District, Minnesota, are true and 320
literal exemplifications of the originals now in this office, showing erasures and interlineations as appear in the originals, except that in Exhibit "F," in lines 1, 6, 25 and 31 of the original certificate of location (being lines 1, 6, 23 and 29 of the copy) and in lines 1, 5, 25 and 31 of the original certificate of adjusted location (being lines 1, 5, 22 and 28 of the copy) and in the briefing, where the letter "D" is written, there appear traces of knife erasures in the originals; also in Exhibit 321
"G," in lines 1 and 26 of the original certificate of location (being lines 1 and 24 of the copy), and in lines 1 and 22, of the original certificate of adjusted location (being lines 1 and 20 of the copy) and in the briefing, where the letter "E" is written, there appear traces of knife erasures in the originals.

In testimony whereof I have hereunto subscribed my name and caused the seal of this of-

fice to be affixed, at the City of Washington, on the day and year above written.

BINGER HERMAN,
Commissioner of the General Land Office.

(United States General
Land Office.)

322

(The following is a literal copy, including erasures, interlineations, exactly as they appear on the exhibit.

G. P. S., Reporter.

TESTIMONY ON PART OF DEFENSE.

323 Frank W. Eaton duly sworn says:

I am one of the parties defendant in this case —I know the description and location of the land in contest.

I had something to do with the improvements on said land. I was the duly appointed attorney in fact for Orillie Moreau-Stram—and authorized the making of the improvements for the purpose of locating the scrip in question, under the rules of the Land Department.

324 "Witness here shown the files in S. H. B. Scrip 19 D. and identified the scrip certificate and power to locate as the authority under which he proceeded in having the improvements made upon the land preparatory to locating the same. Also identified his own affidavit of the fact of the improvements having been made. Files offered in evidence and marked Exhibit "F" and filed.

Witness then shown the files in Scrip No. 19 E. and made a like identification. Files offered in evidence marked Exhibit "G" and filed.

In having these improvements made upon the land in question I had no other purpose in view but the location of the scrip by virtue of the power of attorney. 325

I made the improvements in good faith solely in pursuance of the powers of attorney for the purpose of securing the location of the scrip in proper form and manner.

At the time I caused the improvements to be made the land was unsurveyed and I had no knowledge of it except that it was vacant unoccupied and unclaimed land by any other person. 326

I employed Edward Byrne to go and make the improvements upon the land in the first and I subsequently employed Richard Fagan also to go up there.

I agreed with Edward Byrne that in consideration of the land proving valuable as he represented to me and in consideration of his erecting or causing to be erected or made for me valuable improvements on two locations of 160 acres each, that I would pay his expenses necessarily incurred in doing the work, that I would locate the scrip upon the land and as soon thereafter as the location was completed I would cause to be conveyed to him an undivided one-third interest in the land. 327

To the best of my knowledge Mr. Byrne fulfilled his part of the agreement. I also fulfilled mine.

At the time I made the contract with Byrne I knew nothing about James Power or Joseph Clement. I don't think Thomas Ross did anything. I am informed that he went up on the land but do not know what he did.

I was present when Byrne, Power and Cle-
328 ment returned from the land and saw them at the office of Chas. R. Haines (Mendenhall & Haines.)

Witness here shown Exhibit "C" and identified it.

I was present when that affidavit was made. It was read over to Mr. Power. The subject matter of it was talked over with him and the whole affidavit was dictated by me in Mr. Power's presence. It was made after the deed was executed,
329 conveying Byrne, Power and Clement 1-3 interest in the land.

The circumstances under which the affidavit was made and dictated are as follows: I did not know at that time how much proof was necessary to establish the fact that I had caused improvements to be made on the land, and I thought it necessary that Byrne, Power and Clement should furnish additional proof and for that reason I had this affidavit executed by them to furnish
330 the Department in case more evidence was required.

At the time this affidavit was made Mr. Power was sober and fully understood the contents of it. It was read over to him and explained to him thoroughly.

I have papers from Mrs. Stram confirming all my acts as her attorney and also the acts of Leonidas Merritt.

Witness here produced the papers alluded to.

Offered in evidence by defendant.

Marked Exhibit H and filed.

Edward Byrne was the explorer who first discovered the land, and he came to me and told me of them.

331

CROSS EXAMINATION.

I was never on those lands.

I first saw Orillie Stram March 31st, 1886. I first saw the scrip papers in Duluth, Minn., sometime in the last of May or first of June, 1883, soon after the powers were executed. They were sent here to me and I never had seen them before. I think they were sent by mail. I got them from Byron M. Smith, Minneapolis, Minn.

332

Q. Then you located these pieces of scrip for the purpose through them of obtaining title to the land they should cover yourself? A. My intention was to have an interest in it. I did not expect to have the whole.

Q. Who also did you expect to have an interest? A. Mr. Merritt, Mr. Fagan and Mr. Byrne that is all.

Q. You did not expect Mrs. Stram to have any interest in it then? A. No I did not expect her to have any interest in the land, although she might.

333

Q. You considered them did you not, that by purchasing the scrip you would obtain all the title to the lands to be located under it, and that the scripee named in the scrip would have no interest in the lands and you made the arrangements for the improvements under that supposi-

tion, did you not? A. Objected to together with all this evidence relative to title for the reason that the scrip patent is issued to the scripee. That Frank W. Eaton was only empowered to locate the same and that by the location of the scrip the title became vested in the scripee and it is wholly
334 immaterial what Mr. Eaton may have expected with regard to purchase of the lands as that was a subsequent consideration and no title could pass in any event without the execution of a deed by Orillie Stram or her duly authorized attorney in fact. Defendant also moves to strike out all the testimony as to what Eaton's intentions were as to what interest he and others expected to get in the property.

Question by the Register:

335 Q. Did you not know at this time that Mr. Merritt was empowered by letters of attorney to sell and convert the land and were you not acting with him jointly in the premises.

A. Yes. Mr. Merritt was a business partner of mine at the time.

Answer to question previous to last.

I made the improvements under the supposition that when she conveyed to me her scrip and
336 a power of attorney to locate the same for a valuable consideration and the farther contract on her part for a valuable consideration to fully confirm all my acts and also the acts of Leonidas Merritt her attorney in fact for the purpose of conveying the lands located under and by virtue of said half-breed scrip that all her rights as to any land as far as she was concerned was thereby transferred.

Q. Transferred to whom? A. To whoever her attorney in fact might desire.

Q. You had all these papers that you mentioned in next to your last answer, and Eaton & Merritt had paid the full consideration therefor, before the 16th day of June, 1883? A. No sir.

Q. What of those papers did you not have? 337
A. We had the power to locate and convey prior to that time, but had not fully paid for them.

Q. Who did you pay? A. I made the first payment to Byron M. Smith, and paid the balance to Orillie Stram March 31, 1886. I made no payment to her until then. I had agreed to pay her previous to that time. I made the agreement at the time the powers were obtained by Byron M. Smith.

338

Q. Did you know at the time this land was conveyed by Merritt (Mrs. Stram's attorney) that Smith had made any such arrangement on her behalf?

A. I have already answered the question in answer to the last question before this.

Q. Did you make that arrangement yourself with Mrs. Stram at the time the powers of attorney were given or did somebody else act for you in making that arrangement?

339

(Objected to as immaterial.)

A. Byron M. Smith was acting for me supposing that he had full authority. He acted for me and for her. He held her scrip and got new powers of attorney and made the arrangements. I knew of this arrangement at the time we procured the scrip.

Q. That is then, your arrangement was with Smith that you should pay him a certain sum which you did pay for the scrip and a certain other sum which you paid finally March 31, 1886, to Orillie Stram?

(Objected to as incompetent.)

340 A. Yes.

Q. When was you to pay that sum to Mrs. Stram under the original arrangement? A. After the location was perfected and the scrip adjusted.

Q. Were the names filled in those powers of attorney when you received them or did you fill them in after you received them?

(Objected to as immaterial.)

341 A. They were filled in after I received them.

Q. Was the amount to be paid to Mrs. Stram under your arrangement with Smith dependent in any manner upon the value of the land obtained or was it a fixed amount?

(Objected to as immaterial.)

A. There was a fixed amount between Mr. Smith and myself.

Q. Was Mrs. Stram ever on the land or not—to your knowledge?

342 (Objected to as incompetent.)

A. I don't know anything about it.

Q. Mr. Eaton, will you explain why you made oath in this affidavit that has been offered here that you had as attorney built upon each of said pieces of land a dwelling house 14x16 feet 1 story high built of timber and covered with split shingles with door and windows and had cleared ready for cultivation 1-2 acre of said land and that

said improvements were made under the personal direction of said Orillie Stram and for her personal use and benefit when according to your own testimony you never had seen Orillie Stram and never had been on those lands? A. Because it was true to the best of my information.

Q. You did not make these affidavits on in- 343
formation and belief did you? A. Only that portion relative to the improvements on information and belief, as to the other I was acting as the authorized attorney of Stram under a power of attorney and my acts were her acts, and you can not separate the attorney and principal. And the improvements were made by Mr. Byrne and Mr. Fagan directly in my employ and the improvements were such as Mr. Fagan reported to me which statement of his I then (corrected on 344
reading.) believe to be true. I had only such knowledge in relation to improvements as I have stated.

The men came down from the woods the same day as the deeds to Byrne, Clement and Power were executed.

Q. That is July 2, 1883, if the date in the deed is correct? A. Yes.

Q. How long would it take parties to come 345
down? A. From 3 days to two weeks according to weather and other circumstances. I don't know how long it took them.

Q. Had Fagan been to those lands for you more than once before they all came down? A. That was his second trip when they all came down.

Q. Did you have this scrip when you first made arrangements with Byrne to scrip these

lands? A. I did not have the scrip at that time.

Q. At what time did you make the arrangement with Byrne? A. Sometime the last of May, 1883, we first talked about it. I made a definite arrangement as far as he was concerned at that
346 time. He went up to the lands the next day I think.

Q. Both the powers, to you and Merritt were received by you in blank were they? A. They were.

RE-DIRECT.

Q. Was Power sworn to the affidavit, Exhibit "C," in your presence? A. Yes, he was
347 DULY SWORN.

The power to locate was filled out by Luther Mendenhall, and in the power to convey Mr. Merritt's name was filled in by Byron M. Smith a few days after I received it.

CROSS EXAMINED.

Power was sworn with his hand uplifted sim-
348 ultaneously with Byrne and Clement. I know this by seeing him and the act. Power was in the office all the time during the time the affidavit was being prepared.

Question by Register:

Q. How long a time were you all in Mendenhall & Haines office that day? A. I should say about two hours.

FRANK W. EATON.

Subscribed and sworn to before me
this 14th day of April, 1886.

R. N. MARBLE,
Register.

349

April 15th, 1886.

Edward Byrne being duly sworn, says I am 40 years of age and reside in Duluth, Minn. Have lived here about six and one-half years.

I am an explorer. I know the property that is in controversy in this case. I discovered the property myself.

I know Frank W. Eaton of Duluth, Minn. 350
Have known him about 6 years. I made improvements upon the land in dispute.

I built one house 14x16 feet with a floor and roof, door and window, bunk and table, and another house similar in size to the first house nearly the same as the first except that it had no window although a space was cut out for one. I also cleared 1-2 an acre of land.

I heard the testimony of Hyde and McDonald. 351
They were mistaken as to there being but half a roof on the shanty, at least as they stood when I left them after building them. There might, however, have been a half roof when they went there a year or so after they were built. The house as I left it WAS inhabitable, considering the time of the year there was no stove in it and none was required, that is there was no fire place or chimney as none was required at that time a year.

Heating in that part of the country is done with fire places.

There WAS a door hung in the door way of the shanty with leather straps when I left. Doors and windows of shanties are commonly stolen in that country by settlers to use on their own shan-
352 ties when they find owners of property absent.

I made those improvements under the direction and instruction of Frank W. Eaton.

I made no improvements there in my own behalf. I did not nor did any one with me make any improvements for the purpose of claiming the land ourselves under the homestead or pre-emption law.

Q. Power says that you and he put homestead notices on the buildings. If you did
353 so you may explain why it was done and what was the object. A. We went up to hold this land and make good improvements according to Mr. Eaton's directions, and had to put notices at different places on the land in order to prevent other explorers from squatting or making improvements on the land. Mr. Power understood this and why it was done just as well as I did. Mr. Power was in my employ at the time.

I remember of writing on the shanty "im-
354 provements" but do not remember of writing "homestead" because we never intended to take a homestead.

Witness here shown the stake which was introduced in evidence by the plaintiff and testifies that he does not recognize any of his own writing thereon. I don't know whether that stake came from the land or not. I do not recognize the writing on the stake as my own. I had the ar-

rangement with Mr. Eaton before the improvements were made. The arrangement was made in Eaton's office in Duluth before we went up to the land.

The understanding was that I should receive a 1-3 interest in the land, $50 in cash, all provisions and tools necessary to make and complete 355
the improvements. Mr. Eaton furnished the money as agreed, also tools and provisions.

After making the arrangements with Eaton I made one with James H. Powers.

I intended to employ Warren Miller of Ontonogon, Mich., and make the contract with him but he could not be got at the time and so I took Jas. H. Powers.

I made the arrangements in Welsh's saloon 356
with Power before we left Duluth to go to the land. I told him I was promised a 1-3 interest in these lands from Eaton for going to make the improvements, and to get that 1-3 interest we would have to go on the land, stay some time and make improvements and when everything was settled I would divide the third with him and Clements, who was my partner, when we made the discovery that the land was valuable.

He agreed to the arrangement and went with 357
me and assisted in making the improvements under that agreement. I furnished him $20 to buy his outfit with to go there.

Before starting I took him to Eaton and Merritt's office and introduced him to Leonidas Merritt. We inquired for Mr. Eaton but could not find him. I was present when Power talked to Mr. Merritt, Mr. Eaton's partner.

Q. Did he not state to Mr. Merritt in your presence that he understood from you that you were to receive 1-3 interest in the land and that you had agreed to divide that 1-3 with him and Clement?

Objected to as leading and suggesting the
358 answer to the witness.

A. He did.

Mr. Richard Fagan came upon the land while Power, Clement and I were making the improvements. He came there twice. The first time he came he stated what he came for. He said he came to get the description of the land and assist in making improvements. He stated that Mr. F. W. Eaton sent him and he brought a letter from Eaton at the same time. The letter was
359 addressed to me, Edward Byrne. Mr. Fagan worked about two days.

It would take one man two days to cut the logs alone for each shanty to build the shanty with, and one man could by no means handle the logs in erecting the shanties. The shanties were from 7 to 9 feet high. When Mr. Fagan came the second time Mr. Merritt came with him and I had no conversation with Fagan.

360 We all left the land and came down to Duluth together, there were Mr. Merritt, Mr. Fagan, Power, Clement and an Indian or two and myself. The Indians were packers.

The improvements were all complete when we left there. I did not take Power out one side just before leaving the land and tell him what he was to get, and that was not the first time he knew what he was to get. He finally understood

the whole matter before we left Duluth in the first place. The first place we went to after returning to Duluth was Friedenburg's restaurant (called the parlor saloon) and got our dinner. We then proceeded directly to the office of Mendenhall & Haines. Power, Clement, Merritt, Eaton, Fagan and myself went there together, and we all got our matters fixed up and the papers made out before we left there. I don't know whether Power was there all the time or not. 361

Mr. Power was sober during all the time we was there engaged in making out the papers.

Witness here shown Exhibit "C" and said that he recollected Mr. Haines reading an affidavit containing statements like the one contained in this. I signed this Exhibit "C" and identify my signature. The paper I refer to as having been read over by Mr. Haines, was made out by him and dictated by Mr. Eaton and was sworn to by Jas. H. Power, Edward Byrne (myself) and Jos. Clement. 362

Q. Examine Exhibit "C" and state whether the contents of it are true or not? A. They are true.

I believe Mr. Power fully understood the import of Exhibit "C" before he signed it. 363

I and the other parties all received our pay from Mr. Eaton according to the agreement made before going up there to make improvements.

CROSS EXAMINED.

Mr. Eaton was never on those lands to my knowledge.

Mr. Eaton directed us to go and make good substantial improvements, in the same style as are made by pre-emptors and homesteaders in this country. He did not state specifically how much to clear, but gave a general direction. I don't know whether Orillie Stram was on the land or
364 not. I never saw any half-breed woman there. I did not know or had not heard of any such woman at that time. The first time I ever heard Mrs. Stram's name mentioned was in Haines' office when we made the affidavit.

When I made the arrangements with Mr. Eaton I understood that he had the scrip under his control. Either had it in his possession or had made arrangements for it.

I had discovered the land about three weeks
365 before going up to make improvements. Clement was with me when I found it. I was then at work for the Minnesota Iron Company. Clement and I were what were called mineral explorers at that time, and had been in the employ of the company eighteen months at that time.

RE-DIRECT.

I run the biggest part of all the lines about
366 this land. I run the line through the center of the section east and west. I run a true line east from the 1-4 post on the west side of section 30, run it east 1-2 mile. I did it in order to locate the land and find out where to place the improvements. This was before the survey of the interior of the township.

I used a "Gurley's dial compass." I tested the accuracy of this line by re-tracing the range line for a half mile between sections 11 and 12. I found

the compass correct, and that my line was correct east and west, and a right angle line with the range line. The improvements were made north of this east and west line that I ran. They were two hundred paces north of the line.

I know something about McPherson who made a subsequent survey. I do not consider him 367
a competent surveyor, or any surveyor at all. I have worked under him on surveys.

Q. What do you know about his making surveys which were inaccurate before.

Objected to as irrevelant and immaterial.

A. I don't recollect any.

I consider the survey I made accurate and made the improvement acting under that survey in good faith and believe they are on the land. 368

RE-CROSS.

The land in question shows signs of iron, and was the reason that I considered it valuable.

I will not say positively that I did not write "Homestead" on my shanty or on the stakes.

Q. Do you say that you did not write that on this stake in evidence? A. I can not swear to 369
anything about that stake.

Q. Now I want an answer distinct to this question "Do you swear that you did not write this writing that appears on the stake heretofore introduced in evidence?" A. No.

Q. Give me your opinion whether it is your hand writing or not? A. I believe it is my hand writing.

Q. Particularly examine the word "Homestead" and say if that is your writing? A. I can't say, but I think it is all my writing.

Q. Why was it not just as easy for you to write the name of the scripee for whom that land was being taken upon those improvements and stakes
370 as to write your own name and Power.

Questions by Register.

Q. For what purpose did you put those stakes there with your names? A. To keep other explorers and claimants off under our orders from Eaton and mislead and keep others off the land.

Preceding question objected to as frivolous.

Objection sustained on the ground that witness has already testified that at that time he had
371 no knowledge of the name of the scripee and that words written were written for the purpose of misleading others who might wish to squat on the land.

Plaintiff's attorney excepts to the ruling on the ground that it is arbitrary and not within the power of the Register and Receiver under the rules promulgated by the General Land Office for their government.

372 Q. You understood at the time you were making these marks that you were making this improvements under Sioux half-breed scrip did you? A. Yes.

Q. Who did you understand owned this scrip? A. Frank W. Eaton.

Q. Why did you not mark the stakes and improvements on the lands with Frank W. Eaton's name.

Same objection and same ruling as in the foregoing question. Same exception to plaintiff's attorney.

Q. You thought then did you that it would better serve your purpose to mark those improvements falsely than truly?

Same objection, ruling and exception. 373

Answer to question by Register.

I was aware that the lands were valuable four years before the improvements were made but had not made a careful examination of them until about three weeks before making the arrangements with Mr. Eaton.

Q. Did you mark these lands as you did to mislead any person who might have an interest in the land by settlement or otherwise or did you as being the first party who made improvements 374 thereon mark them to mislead and keep others off and thus protect the interests of Mr. Eaton who employed you? A. I marked them to protect Mr. Eaton's interests and keep others off as I was the first party to make improvements and I thereafter walked about the lines for days with a revolver to protect Eaton's interests and keep others off.

Q. Was Lonstorf there while you were there? A. Yes. Mr. Hartman was there also. The latter was there 10 or 12 days before Fagan & Merritt 375 came. It was before Fagan came the first time. I had no talk with Hartman that I recollect of about selling to him, although I will not say that I did not have any such talk. I heard Mr. Hartman's testimony.

Q. Did you not tell him as he said that if parties were not there that day whom you expected you would treat with him for sale, or words to that

effect? A. I had nothing to sell. I don't remember telling him so. I don't remember whether I told him so or not.

A. I will not say whether I did or did not tell him so.

A. I can't say how many days I was there
376 before Fagan came the first time but I think about 15 days.

A. About the same length of time afterwards we came down.

A. We were about 6 days coming down.

A. We left here to go up there about the middle of May, 1883.

A. We were about 6 days going up.

377 A. We were on the land not quite a month I think.

A. The improvements were not completed when Fagan left there the first time.

A. My shanty was completed but Powers' was not.

A. Powers' was completed afterwards.

A. The door was hung on the inside and it fit as near as they generally fit in the woods.

378 A. There was a jam in the door way.

A. The roof part that was covered with shakes was a portion on each end, say a foot or 18 inches.

A. The shanties were chinked but not mossed.

A. I do not know whether Power drank any after he came in town that day at the Friedenburg's restaurant (Parlor Saloon) or not.

A. I don't know whether he and Clement went across the street from Mendenhall & Haines office and got some drinks or not.

A. We were all three sworn to the affidavit in the same way at the same time and by the same officer.

Q. How was that done? A. As near as I 379
can recollect the affidavit was read over by Mr. Haines who asked if we understood it we held up our right hands, swore to it and signed our names then he went to the desk and put his stamp on it.

A. I saw Power hold up his right hand.

A. By window I mean a hole cut in between the logs we had no glass window.

A. The contents of the letter from 380
Eaton which I spoke of were to the effect that he had been disappointed in getting the description of the claims from the man he had sent up there before, and sent Mr. Fagan up to get another description and assist us with the work. That was the substance of it.

Q. What was your idea in getting Power to go with you to improve this land if you already had Clement as a partner. Why did you and 381
Clement not do it without taking a third man? A. Because Clement had a preemption filing in 62 R. 16 at that time, and was well acquainted in the country.

Q. How did that make any difference with his assisting you along without Power's help in making these improvements on the land that you were improving so that Eaton might get them with Sioux scrip? A. Because the parties, the

parties that I was suspicious of would take advantage of the knowledge they had of Clement having a preemption and go on the land in opposition to him sooner than they would against a man who had no filing.

Q. Did not Power have a pre-emption claim too? A. I was not aware that he had at the time I employed him in Duluth.

382

Q. Do you pretend to say that the fact that a man had taken a pre-emption claim would thereafter prevent him taking a homestead and that was the reason why Clement could not go on this land and make improvements with you?

(Objected to for the reason that witness has not testified to anything of the kind included in the question but has explained his very reasons.)

383 A. I cannot answer the question.

RE-DIRECT.

When Fagan left for Duluth the first time the improvements were all completed except hanging the door and cutting a window. After he came there he assisted in completing them up to that point.

A. Speaking of Hartman and what I told

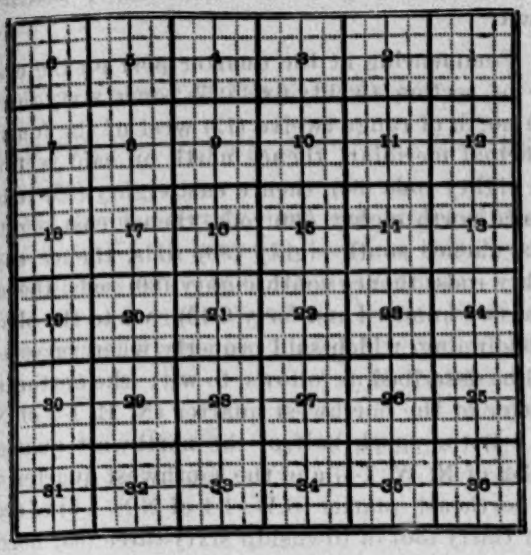
384 him I will say that many people came there making propositions to me and I had to tell them anything I could devise to get rid of them and get them to leave me alone.

EDWARD BYRNE.

Subscribed and sworn to before me
this 15th day of April, 1886.

R. N. MARBLE,
Register.

Township 63, Range No. 11 W., 4th P. Mer.



385

386

STATE OF MINNESOTA, COUNTY OF ST. Louis.—ss.

U. S. Land Office,
Duluth, Minn.

387

In the matter of the application of Orillie Stram, formerly Orillie Moreau to locate Sioux half-breed scrip No. 19 Letter D., for one hundred sixty acres of land.

Frank W. Eaton being duly sworn on his oath says that he is the attorney in fact of said Orillie Stram and is duly authorized by her to locate the scrip above described, and that he has so located the same as such attorney in fact on

the following described unsurveyed real estate within the limits of the Duluth Land District, to-wit:

Commencing at the quarter post on the east line of section twenty-five (25) town sixty-three (63) north of range twelve (12) west of the fourth
388 principal meridian, thence north on said section line eighty rods (80), thence east eighty (80) rods, thence north eighty (80) rods, thence east eighty rods, thence south eighty (80) rods, thence east eighty rods, thence south eighty (80) rods, thence west two hundred and forty (240) rods to the place of beginning, which said property when surveyed will be described as follows, to-wit: the northeast quarter of the northwest quarter (N. E. 1-4 of N. W. 1-4) the south half of the northwest quarter
389 (S. 1-2 of N. W. 1-4) and the southwest quarter of the northeast quarter (S.W. 1-4 of N.E. 1-4) of section thirty (30) in township sixty-three (63) north of range eleven (11) west of the fourth principal meridian. That he has as such attorney built upon said land a dwelling house fourteen by sixteen feet, one story high, built of timber and covered with split shingles with door and windows, and has cleared ready for cultivation one-half acre of said land.

390 That said improvements were made under the personal direction of said Orillie Stram and for her personal use and benefit and under and by authority of said power of attorney hereto attached.

FRANK W. EATON.

Sworn and subscribed before me this
16th day of June, A. D. 1883.

J. R. CAREY,
Register.

Scrip Certificate No. 19 D., Register and Receiver's No..... Sionx half-breed reserve at Lake Pepin.

ACT OF JULY 17, 1854.

LAND OFFICE, Duluth, Minnesota, June 16th, 1883. 391

We hereby certify, that the attached half-breed scrip No. 19 Letter D.—was on this day received at this office from Orillie Stram by .... of Crawford County, State of Wisconsin by F. W. Eaton, her attorney in fact.

J. R. CASEY,
Register.

W. W. SPALDING,
Receiver. 392

I, Orillie Stram, formerly Orillie Moreau of Crawford County, State of Wisconsin, hereby apply to locate and do locate, the following unsurveyed tract of land, designated as follows, to-wit: Commencing at the quarter post at the east line of section twenty-five (25) town sixty-three (63) north of range twelve (12) west of the fourth principal meridian, thence north on said section line eighty rods, thence east eighty rods, thence north eighty rods, thence east eighty rods, thence south eighty rods, thence east eighty rods, thence south eighty rods, thence west two hundred and forty rods to the place of beginning, containing one hundred sixty— acres, in the District of Lands, subject to sale at the Land Office at Duluth, Minn., in satis- 393

faction of the attached scrip No. 19 Letter D., issued under the Act of Congress, July 17th, 1854.

Witness my hand and seal this 16th day of June, 1883.

ORILLIE STRAM, by (Seal)
Attest: F. W. EATON,
394 Her Attorney in Fact.

LAND OFFICE, Duluth, Minn.,
June 16, 1883.

We hereby certify, that the annexed Scrip No. 19 Letter D., has this day been located on the unsurveyed tract of land, as described within,
395 containing one hundred sixty (160) acres, agreeably to the Act of Congress of July 17, 1854, and by the party duly authorized to make such location.

J. R. CASEY,
Register.
W. W. SPALDING,
Receiver.

396

(Indorsed on back.)

LAND OFFICE, Duluth, Minn.,
June 16, 1883.

Richard Fagan, being duly sworn, says: I am acquainted with the unsurveyed tract of land described within, by personal examination of the same on the tenth 10th day of June, 1883, and that there was no person living on the same at that

time, nor were there any improvements on it, except those of Orilie Stram.....nor any person claiming said tract.

RICHARD FAGAN.

Sworn and subscribed before me this 16th day of June, 1883.

J. R. CASEY, 397
Register.

Scrip certificate No. 19 D., Register and Receiver's No. 188.

SIOUX HALF-BREED RESERVE AT LAKE PEPIN.

ACT OF JULY 17, 1854.

LAND OFFICE, July 21st, 1885. 398

We hereby certify, that the attached half-breed scrip, No. 19 D., Letter D., was on this day adjusted by Orilie Stram formerly Orilie Moreau, of St. Louis County, State of Minnesota.

G. G. HARTLEY,
Register.

E. G. SWANSTROM,
Receiver.

399

I, Orilie Stram, formerly Orilie Moreau of Crawford County, State of Wisconsin, hereby apply to locate and do locate the tract of land, designated as follows, to-wit: Lots number three (3), five (5) and six (6) and southeast quarter of northwest quarter of section thirty (30) in township number sixty-

three (63) north of range eleven (11) west of 4th principal meridian (the above location is hereby made to adjust to the U. S. survey, the location made June 16th, 1883, upon unsurveyed lands of half-breed scrip No. 19 Letter D., issued under the Act of Congress July 17th, 1854, containing
400 one hundred sixty-one and 67-100 acres in the District of Land subject to sale at the Land Office at Duluth, Minn., in satisfaction of the attached scrip No. 19 Letter D., issued under the Act of Congress, July 17th, 1854.

Witness my hand and seal this 21st day of July, 1885.

ORILIE STRAM, (Seal.)
By F. W. EATON,
Her Attorney in Fact.

401 Attest:
N. B. THAYER.

LAND OFFICE,
July 21st, Duluth, 1885.

We hereby certify that the annexed scrip No. 19 Letter D., has been this day adjusted on the
402 tract of land, as described within, containing 161 61-100 acres, agreeably to the Act of Congress of July 17, 1854, and by the party duly authorized to make such location.

G. G. HARTLEY,
Register.
E. G. SWANSTROM,
Receiver.

Excess receipt No. 7.762 for 1.61-100 acres at $1.25 per acre $2.00.

(Indorsed on back.)

Land Office 187

See to James A. George, April 18, 1895.

Being duly sworn says: I am acquainted with the tract

33332

See to James A. George, April 30, 1895. 403

A. M. H.

of land described within, by personal examination of the same

See to R. & R., May 18, 1895.

on the day of 187 and that there was no per-

telegram Div. "A." H.

A. M. H.

son living on the same at that time, nor were there any im- 404

See to Geo. J. Lornstorf, May 6 and 8, 1895.

A. M. H.

provements on it except those of

See to R. & R., Aug. 2, 1895, enclosing scrip.

nor any person claiming said tract.

See to Burdette, Thompson & Low, Aug. 5, 1895.

A. M. H.

Sworn and subscribed before me this

day 187 405

See to James A. George, Aug. 5, 1895.

A. M. H.

Register.

"(" to Secretary, Sept. 17, 1895.

EXHIBIT F.

Filed April 14, 1886. R. & R. No. 187.

U. S. Land Office, Duluth, Minn., July 21st, 1885.

"C" to Hon. Edward Stringer.

306 _____

Feby. 19, 1896, as to delivery of this scrip.

Sioux half-breed scrip, Certificate 19 D. Register No. 188, located by F. W. Eaton, attorney in fact for Orilie Moreau, Sec. 30, Tp. 63, N. R. 11 W.

_____

407 Noted on scrip record. Cancelled by Dept. Decision of Feby. 18, 1889, affirming ours of Mch. 7-87. See to R. & R., Feby. 19, 1889, E. S. E. Div. H. Posted on Tract Book Sept. 9-1885.

_____

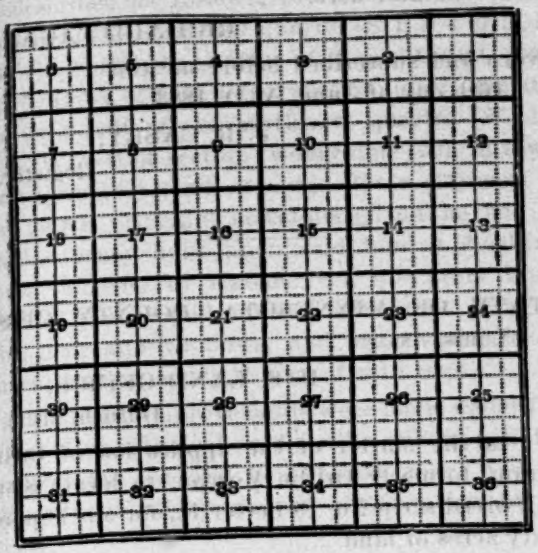
Cancellation noted June 4-89, M. P. W. See to R. & R., April 17-1895. A. M. H.

(Over.)

408 9-250. 86-99065-K.

_____

Township No. 63, Range No. 11 W., 4th P. M.



409

410

U. S. LAND OFFICE,
Duluth, Minn.

STATE OF MINNESOTA, COUNTY OF ST. Louis.—ss.

In the matter of the application of Orillie Stram to locate Sioux half-breed scrip No. 19 Letter E., for 160 acres of unsurveyed land. 411

Richard Fagan being first duly sworn on his oath says that he is acquainted with Frank W. Eaton and with the land described above, that he has been upon said land and knows the character of the improvements thereon, that such improvements consist of a one-story dwelling house, fourteen by sixteen feet, with door and windows, and

shingle roof, that there is cleared on said land about one half acre.

RICHARD FAGAN,

Sworn and subscribed before me this
16th day of June, A. D. 1883.

J. R. CASEY,

412 Register.

STATE OF MINNESOTA, COUNTY OF ST. Louis.—ss.

U. S. LAND OFFICE,
Duluth, Minn.

In the matter of the application of Orillie
413 Stram, formerly Orillie Moreau, to locate Sioux half-breed scrip No. 19 Letter E., for one hundred sixty acres of land.

Frank W. Eaton being duly sworn on his oath says, that he is the attorney in fact of said Orillie Stram, and is duly authorized to locate for her the scrip above described, and that he has so located the same upon the following described unsurveyed land in the Duluth Land District, to-wit: Starting at the quarter post on the east
414 line of section twenty-five (25) in town sixty-three (63) north of range twelve (12) west of the fourth principal meridian, thence east two hundred and forty rods (240) to the place of beginning of the land located, thence south eighty (80) rods, thence east eighty (80) rods, thence north eighty (80) rods, thence east eighty (80) rods, thence north one hundred sixty rods, thence west eighty (80) rods; thence south eighty (80) rods, thence west eighty (80) rods, thence south eighty (80) rods to the place

of beginning, which said land when surveyed will be described as follows, to-wit: The southeast quarter of the northeast quarter (S. E. 1-4 of N. E. 1-4), the northeast quarter of the southeast quarter (N. E. 1-4 of S. E. 1-4) of section thirty (30), and the west half of the northwest quarter (W. 1-2 of N. W. 1-4) of section twenty-nine (29), in town sixty-three (63) north of range eleven (11) west of the fourth principal meridian. That he has as such attorney built upon said land a dwelling house fourteen by sixteen feet, one story high, built of timber and covered with split shingles with door and windows, and has cleared ready for cultivation one-half acre of said land. 415

That said improvements were made under the personal direction of said Orillie Stram and for her personal use and benefit and under and by authority of said power of attorney hereto attached. 416

FRANK W. EATON.

Sworn and subscribed before me this
16th day of June, A. D. 1883.

J. R. CASEY,
Register.

417

U. S. LAND OFFICE,
Duluth, Minn.

STATE OF MINNESOTA, COUNTY OF ST. Louis.—ss.

Richard Fagan, being duly sworn on his oath, says that he is acquainted with Frank W. Eaton, the affiant in the affidavit hereto attached; that he is acquainted with the land described in said

affidavit and has been on the said land, that he has read said affidavit and knows the contents thereof and knows of his own knowledge that the improvements therein described have been made as therein described and are now on the said land, and the statements in said affidavit,
418 made in regard to said improvements are correct.

RICHARD FAGAN.

Sworn and subscribed before me this
16th day of June, A. D. 1883.

J. R. CASEY,
Register.

---

419 Scrip Certificate No. 19 E. Register and Receiver's No.

SIOUX HALF-BREED RESERVE AT LAKE PEPIN.

ACT OF JULY 17, 1854.

LAND OFFICE, Duluth, Minn.,
June 16, 1883.

420 We hereby certify, that the attached half-breed scrip No. 19 Letter E., was on this day received at this office from Orillie Stram ..... of Crawford County....., State of Wisconsin, by Frank W. Eaton, her attorney in fact.

J. R. CASEY,
Register.

W. W. SPALDING,
Receiver.

I, Orillie Stram, formerly Orillie Moreau, of Crawford County, State of Wisconsin, hereby apply to locate and do locate the unsurveyed tract of land, designated as follows, to-wit: Starting at the quarter post on the east line of section twenty-five (25) in town sixty-three (63) north of range twelve (12) west of the fourth principal meridian thence east two hundred forty rods to the place of beginning of the land located, thence south eighty (80) rods, thence east eighty rods, thence north eighty rods, thence east eighty rods, thence north one hundred sixty rods, thence west eighty rods, thence south eighty rods, thence west eighty rods, thence south eighty rods to the place of beginning, containing one hundred sixty (160) acres, in the District of Lands subject to sale at the Land Office at Duluth, Minn., in satisfaction of the attached scrip No. 19 Letter E. issued under the Act of Congress, July 17th, 1854. 421 422

Witness my hand and seal this 16th day of June, 1883.

ORILIE STRAM, by (Seal.)

Attest:

F. W. EATON,
Her Attorney in Fact.

423

U. S. LAND OFFICE,
Duluth, Minn.
June 16, 1883.

We hereby certify, that the annexed scrip No. 19 Letter D., has been this day located on the unsurveyed tract of land, as described within, containing one hundred sixty (160) acres agreeably

to the Act of Congress of July 17, 1854, and by the party duly authorized to make such location.

J. B. CASEY,
Register.

W. W. SPALDING,
Receiver.

424

Scrip Certificate No. 19 E. Register and Receiver's No. 187.

SIOUX HALF-BREED RESERVE AT LAKE PEPIN.

ACT OF JULY 17, 1854.

425 LAND OFFICE, Duluth, Minn.,
July 21st, 1885.

We hereby certify, that the attached half-breed scrip No. 19 D., Letter D., was on this day adjusted at this office by Orillie Moreau of St. Louis County, State of Minnesota.

G. G. HARTLEY,
Register.

E. G. SWANSTROM,
Receiver.

426

I, Orillie Stram, formerly Orillie Moreau, of Crawford County, State of Wisconsin hereby apply to locate and do locate, the ..... tract of land, designated as follows, to-wit: Lots number one (1) and two (2) and southwest quarter of northeast quarter and northwest quarter of

southeast quarter of section thirty (30) in township number sixty-three (63) north of range eleven (11) west of 4th principal meridian.

(The above location is hereby made to adjust to the U. S. survey, the location made June 16th, 1883, upon unsurveyed land of half-breed scrip No. 19 Letter E., issued under the Act of Congress July 17th, 1854,) containing one hundred and fifty-two acres, in the District of Lands subject to sale at the Land Office at Duluth, Minn., in satisfaction of the attached scrip No. 19 Letter E., issued under the Act of Congress, July 17th, 1854. 427

Witness my hand and seal this 21st day of July, 1885.

ORILIE STRAM, by (Seal.)
F. W. EATON, 428
Her Attorney in Fact.

Attest:
N. B. THAYER.

LAND OFFICE, Duluth, Minn.,
July 21st, 1885.

We hereby certify, that the annexed scrip No. 19 Letter E. has been this day located on the.... tract of land, as described within, containing.... 152....acres, agreeably to the Act of Congress of July 17, 1854, and by the party duly authorized to make such location. 429

G. G. HARTLEY,
Register.
E. G. SWANSTROM,
Receiver.

(Indorsed on back.)

Land Office, 187

See to James A. George, April 18, 1895.

being duly sworn, says, I am acquainted with the tract of

33332

430 See to James A. George, April 30, 1895.

A. M. H.

land described within, by personal examination of the same on

See telegram Mar. 18, 1895, to R. & R., calling for report.

A. M. H.

the day of 187 and that there was no person liv-

See to Geo. L. Lonstorf, May 6 and 18, 1895.

431

A. M. H.

ing on the same at that time, nor were there any improvements

See to R. & R. Aug. 2, 1895, enclosing scrip.

A. M. H.

on it except those of nor any person claiming said

See to Burdette, Thompson & Low, Aug. 5, 1895.

A. M. H.

tract.

432 See to James A. George, Aug 5, 1895.

A. M. H.

Sworn and subscribed before me this day of 187.

"C" to Secretary Sept. 17, 1895.

Register.

EXHIBIT G.

Filed April 14-86. R. & R. No. 188. "C" to R. & R. Dec. 30-95.

U. S. LAND OFFICE, 433

Duluth, Minn.

July 21, 1885.

"C" to Hon. E. C. Stringer as to delivery of this scrip Feby. 19-96. Sioux half-breed scrip certificate 19 E. Register's No. 187. Located by F. W. Eaton, attorney in fact for Orillie Morean, Sec. 30, Tp. 63, N. R. 11 W.

434

Noted on scrip record H.

Cancelled by Dept. Decision of Feby. 18, 1889, affirming ours of Mch 7-87. See to R. & R., Feby. 19-89 E. S. E. Div. "H" Poste Pkn tract Book Sept. 9-85.

Cancellation noted June 4-89. J. M. R. 435

See to R. & R. April 17, 1895. W. P. W.

9230. A. M. H. 86-99065. (Over.)

STATE OF MINNESOTA, COUNTY OF ST. Louis.—ss.

Edward Byrne, James H. Powers and Joseph Clement of said county and state, being first duly

sworn, make oath and say that they have made good and substantial improvements on the following described land, to-wit: In sections twenty-nine (29) and thirty (30) in township sixty-three (63) north of range eleven (11) west of the 4th principal meridian, located under and by virtue of Sioux half-breed scrip No. 19 E., Letter "E" for 160 acres, and by No. 19 Letter "D" Sioux scrip, issued to Orilie Stram (formerly Orilie Morian) for and under the personal direction of Frank W. Eaton, attorney in fact of said Orilie Stram and Roman Stram, her husband—and have made no improvements on said land either for themselves, or any other person, intending to claim the same under the Homestead or Pre-emption law, or for any purpose whatever, other than above described, and to our certain knowledge there is or has not been any other improvements made on above described lands, by any other person or persons.

436

437

EDWARD BYRNE,
JAMES H. POWER,
JOSEPH CLEMENT.

Sworn to and subscribed before me this second day of July, A. D., 1883.

CHAS. R. HAINES,
Notary Public, St. Louis Co., Minn.

438

(Seal.)

This indenture made this 31st day of March, in the year of our Lord one thousand eight hundred and eighty-six between Orillie Stram (before marriage Orillie Moreau) and Roman Stram, her

husband, of Crawford County and State of Wisconsin, parties of the first part, and Frank W. Eaton, of Duluth, St. Louis County, State of Minnesota, party of the second part.

Witnesseth that whereas the said Frank W. Eaton as our duly constituted and appointed attorney in fact did on the 16th day of June, A. D. 439
1883, cause to be filed in the U. S. Land Office at Duluth, Minnesota, an application for certain lands and Sioux half-breed scrip No. 19 D. and No. 19 E, each for 160 acres of land, thereby by virtue of the laws of the United States and conditions precedent which had been complied with by the said Frank W. Eaton our attorney in fact as aforesaid, vesting the title to the said land as described in said application by metes and bounds in me the said Orilie Stram (the said description 440
being by metes and bounds for the reason that the said land had not yet been surveyed by the United States,) which said land has since been surveyed by the government and plat thereof

—2—

filed in the United States Land Office, at Duluth, Minnesota, and upon said plat the aforesaid scrip and entry was adjusted 441
July 21st, A. D. 1885, thereby specifically and perfectly describing the land filed upon for me the said Orilie Stram by the said Frank W. Eaton and intended to be entered on June 16th, A.D. 1883, in the name of me, the said Orillie Stram, by our attorney in fact the said Frank W. Eaton and, Whereas, we, the said Orillie Stram and Roman Stram did on the 25th day of May, A. D. 1883, by two certain powers of attorney duly

executed acknowledged and delivered by us to Leonidas Merritt of Duluth, St. Louis County, State of Minnesota, which said powers of attorney were duly recorded in the office of the Register of Deeds for St. Louis County, Minnesota, in Book "A" of Powers of Attorney on pages 613 and 614 therein and thereby constituting and appointing
442 the said Leonidas Merritt the attorney in fact of the said Orillie Stram with full power and authority in her name and stead to grant, bargain, sell, demise, lease, convey and confirm the said lands which we then owned or which we might thereafter acquire or become seized of under and

—3—

443 by virtue of locations of Sioux half-breed scrip No. 19 E. for 160 acres of land and No. 19 D. for 160 acres of land issued to me the said Orillie Stram and,

Whereas, the said Leonidas Merritt, as our attorney in fact on the 30th day of October, A. D. 1885, did by Warranty Deed duly executed by him convey to the said Frank W. Eaton an undivided seven-ninths part and interest in the said lands which according to the said survey and plat and
444 in said deed are described as follows, to-wit: All of the following pieces, parcels and tracts of land situate in the Counties of St. Louis and Lake in the State of Minnesota, described as follows, to-wit: Lots one (1), two (2), three (3), five (5) and six (6), the southwest quarter of the northeast quarter, the southeast quarter of the northwest quarter and the northwest quarter of the southeast quarter all being in section thirty (30) in township No. sixty-three (63) north of range eleven (11), west

of the 4th principal meridian in Minnesota, containing according to the government survey three hundred thirteen and 61-100 (313.61) acres of land more or less, which said Warranty Deed was upon

—4—

the 3rd day of November, A. D. 1885, at 2 o'clock P. M. duly recorded in the office of the Register of Deeds for St. Louis County, Minnesota, in Book A. 3 of Deeds, page 350 and in the office of the Register of Deeds for the County of Lake in the State of Minnesota, on the 5th day of December, A. D. 1885, at 3 o'clock P. M. in Book D. of Deeds, page 205. Now, therefore, we the said Orillie Stram and Roman Stram, parties of the first part do hereby fully ratify and confirm the said conveyances of said land as above described to the said Frank W. Eaton by our said attorney in fact, the said Leonidas Merritt and do hereby and herein fully ratify and confirm all and every act, conveyance made and matter and thing done by our said attorney in fact Leonidas Merritt under and by virtue of the said power of attorney as aforesaid. For the purpose of more effectually ratifying and confirming the acts of our said attorney Leonidas Merritt and in consideration of the sum of one (1) dollar to us in hand paid by the said party of the second part the receipt whereof is hereby confessed and acknowledged

445 446 447

—5—

have granted, bargained, sold and conveyed and by these presents do grant, bargain, sell and convey unto the said Frank W. Eaton, party of the

second part, his heirs, and assigns forever, an undivided seven-ninths part and interest in the following described tracts or parcels of land situate in the Counties of St. Louis and Lake and State of Minnesota, known and described as follows, to-wit:

448 Lots one (1), two (2), three (3), five (5) and six (6). The southwest quarter of the northeast quarter. The southeast quarter of the northwest quarter and the northwest quarter of the southeast quarter, all being in section thirty (30), in township No. sixty-three (63) north of range No. eleven (11) west of the 4th principal meridian in Minnesota, containing according to the government survey three hundred thirteen and sixty-one hundredths (313.61) acres more or less.

449 To have and to hold the same together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said party of the second part, her heirs and assigns forever and the said parties of the first part for their heirs, executors and administrators, do covenant with the said party of the second part, his heirs and assigns forever, that they are well seized in fee of the said land and premises aforesaid, and have good right to sell
450 and convey the said land in manner and form aforesaid and that the same is free and clear from all incumbrances; and the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the parties of the first part will warrant and defend.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

ORILIE STRAM, (Seal.)
Formerly Orilie Moreau.
ROMAN STRAM.

Signed and delivered in presence of 451

JAC. RAFFAUF.
ALEX. RAFFAUF.

STATE OF WISCONSIN, COUNTY OF CRAWFORD. 452

I, Jac. Raffauf, a notary public within and for said county, do hereby certify that on the 31 day of March, A. D. 1886, personally came

—6—

before me Orilie Stram formerly Orilie Moreau and Roman Stram, her husband, to me well known to be the same persons described in and who executed the foregoing instrument and they acknowledged that they executed the same freely and voluntarily for the uses and purposes therein mentioned. 453

JAC. RAFFAUF,
(Seal.) Notary Public,
For Crawford Co., Wisconsin.

OFFICE OF REGISTER OF DEEDS.

STATE OF MINNESOTA, COUNTY OF LAKE.—ss.

I hereby certify that the within instrument was filed in this office for record on the 24th day of April, A. D. 1886, at 8 o'clock A. M., and was
454 duly recorded in Book D. of Deed Records, page 264 and 265.

G. A. SCHULZE,
Register of Deeds.

By.....Deputy.

1648 "H" Warranty Deed and Confirmation. Or-
455 ilie Stram and husband, to Frank W. Eaton.

OFFICE OF REGISTER OF DEEDS.

COUNTY OF SAINT LOUIS.—ss.

I hereby certify that the within deed was filed in this office for record on the 3rd day of April, A. D. 1886, at 9 o'clock A. M., and was duly recorded in Book 8 of Deeds, page 46.

FRANK BURKE, Jr.,
Register of Deeds.

456 By.....Deputy.

Not entered for taxation this.....day of .....A. D. 18...

.....
County Auditor.

D. Patents, p. 269.

No. 12801.

UNITED STATES OF AMERICA TO FRANK HICKS, PATENT.

Filed for record February 18, 1899, at 4.15 P. M. 457

THE UNITED STATES OF AMERICA

To whom these presents shall come, Greeting.

Homestead Certificate No. 2053.

Application 10735.

Whereas there has been deposited in the General Land Office of the United States a certificate of the Register of the Land Office at Duluth, Minnesota, whereby it appears that pursuant to the 458
Act of Congress approved 20th May, 1862, "to secure homesteads to actual settlers on the public domain" and the acts supplemental thereto, the claim of Frank Hicks, assignee of Stephen Bond, has been established and duly consummated in conformity to law for the lots numbered three, five and six of section thirty in township sixty-three north of range eleven west of the fourth principal meridian in Minnesota, containing one hundred twenty-one acres and sixty one hundredths of an acre according to the official plat of the sur- 459
vey of the said land returned to the General Land Office by the surveyor general.

Now, know ye that there is therefore granted by the United States unto the said Frank Hicks the tract of land above described to have and to hold the said tract of land with the appurtenances thereof and to his heirs and assigns, forever.

In testimony whereof, I William McKinley, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Wash-
460 ington the tenth day of May, in the year of our Lord, one thousand eight hundred ninety eight, and of the independence of the United States the one hundred and twenty-second.

By the President,
WILLIAM McKINLEY,
By F. M. McKEAN, Secretary.

(United States General
Land Office.)

461 ———

Recorded Vol. 89, page 156.
C. H. BRUSH,
Recorder of the General Land Office.

———

(136 Deeds 42.)

Instrument No. 12802.

462 FRANK HICKS ET UX,
to
THE MIDWAY CO.
WARRANTY DEED.

Filed for record the 18 day of Feb., A. D. 1899, at 4:15 P. M.

.....
Register of Deeds.
By.....Deputy.

This indenture made this 21st day of October in the year of our Lord one thousand eight hundred ninety-seven, between Frank Hicks and Myrtie M. Hicks, his wife, of the county of St. Louis and State of Minnesota, parties of the first part, and The Midway Company (a corporation) of the County of St. Louis and State of Minnesota, 463

Witnesseth, that the said parties of the first part in consideration of the sum of five thousand($5,000.00)dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said party of the second part, its successors and assigns, forever, all the tracts or parcels of land lying and being in the County of Lake and State of Minnesota, described 464 as follows, to-wit:

Lots three (3), five (5) and six (6), section thirty (30), township sixty-three (63) north, range eleven (11) west 4th principal meridian.

To have and to hold the same together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said party of the second part, its successors and assigns, forever. And the said Frank Hicks, one of the said parties of the first part, for himself, 465 his heirs, executors and administrators, does covenant with the said party of the second part, its successors and assigns, that he is well seized in fee of the lands and premises aforesaid and has good right to sell and convey the same in manner and form aforesaid, and that the same are free from all incumbrances, and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the sec-

ond part, its successors, and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the said party of the first part will warrant and defend.

In testimony whereof the said parties of the first part has hereunto set their hands and seals
466 the day and year first above written.

FRANK HICKS, (Seal.)
MYRTIE M. HICKS, (Seal.)

Signed, sealed and delivered in
presence of
B. H. HOLMES.
W. N. DRAPER.

---

467 STATE OF MINNESOTA, COUNTY OF ST. LOUIS.—ss.

On this 21st day of October, A. D. 1897, before me, a notary public, within and for said county, personally appeared Frank Hicks and Myrtie M. Hicks, his wife, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

468 B. H. HOLMES,
Notary Public,
St. Louis County, Minn.

(Notarial Seal St. Louis
County, Minn.)

(Copy of A. 3 Deeds, p. 350.)

Receipt.

Nov. 23rd, 1885, at 2 p. m.

Receiver's Receipt No. 7762.

Receiver's Office, Duluth, Minn.,

July 21st, 1885.

Received of Orillie Stram the sum of two dol- 469
lars....cents, being in full for one acre and 61 hundredths of lot 3, 5 and 6 and S. E. 1-4 of N. W. 1-4 section No. 30, in township No. 63, N. of range No. 11 W., being excess in said tract over the area entered under the Sioux half-breed scrip 19 E., R. and R., 188.

E. G. SWANSROM,

$2.00. Receiver.

470

(Copy of A. 3 Deeds, p. 350.)

Warranty Deed. Filed November 23rd, 1885, at 2 P. M.

This indenture made this thirtieth day of October in the year of our Lord one thousand eight hundred and eight-five, between Orillie Stram (before married Orillie Moreau) and Roman Stram, her husband, by Leonidas Merritt, their attorney 471
in fact, parties of the first part, and Frank W. Eaton of Duluth, Minnesota, party of the second part, witnesseth—

Whereas, on the 13th day of June, A. D. 1883, grantors herein by their attorney in fact, caused to be filed in the U. S. Land Office at Duluth, Minnesota, an application for certain lands and Sioux half-breed scrip No. 19 D. and No. 19 E. each for 160 acres of land there by virtue of the laws of

the United States and conditions precedent, which has been complied with, vesting the title to the said lands described in said application by metes and bounds in her, the said Orillie Stram (said description being by metes and bounds for the reason that said land had not yet been surveyed
472 by the government); and whereas, said land has since been surveyed under the direction of the government and a plat thereof filed in the said U. S. Land Office at Duluth, upon which said plat the aforesaid scrip and entry was adjusted July 21, 1885, thereby specifically and properly directing the land filed upon and intended to be entered on June 13th, 1883, in the name of said Orillie Stram, by her attorney in fact.

Now, therefore, in consideration of one dol-
473 lar and for the purpose of reaffirming, reforming and properly describing certain deeds of conveyance of said land heretofore given, said parties of the first part do hereby grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns, forever, all of an undivided seven-ninths part of and interest in and to all of the following pieces, parcels and tracts of land, situate in the Counties of Saint Louis and Lake in the State of Minnesota, described as follows, to-
474 wit: Lots one (1), two (2), three (3), five (5) and six (6), the southwest quarter of the northeast quarter, and southeast quarter of the northwest quarter, and the northwest quarter of the southeast quarter, all being in section thirty (30) and in township No. sixty-three (63) north and of range No. eleven (11) west of the fourth (4) principal meridian in Minnesota, containing according to the United States government survey three hun-

dred thirteen and sixty-one hundredths (313.61) acres more or less.

To have and to hold the same together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said party of the first part for their heirs, executors and administrators do covenant with the said party of the second part, his heirs and assigns, that they are well seized in fee of the said land and premises aforesaid and have good right to sell and convey the said land in manner and form aforesaid; that the same is free and clear from all incumbrances and the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the said parties of the first part will warrant and defend. 475 476

In testimony whereof the said parties of the first part have by their attorney in fact hereunto set their hands and seals the day and year first above written.

Erasures in 2nd and 3rd lines of this page made before signing and interlineations made between 2nd and 3d line before execution.

ORILLIE STRAM, (Seal.) 477
By LEONIDAS MERRITT, (Seal.)
Her Attorney in Fact.
ROMAN STRAM, (Seal.)
By LEONIDAS MERRITT, (Seal.)
His Attorney in Fact.

Signed, sealed and delivered in presence of
R. N. MARBLE,
W. C. JOHNSON.

STATE OF MINNESOTA, COUNTY OF ST. Louis.—ss.

On this thirtieth day of October, A. D. 1885, before me, Ralph N. Marble, notary public in and for said county, personally came Leonidas Merritt, as the attorney in fact for Orillie Stram and Roman Stram and acknowledged that he executed
478 the foregoing deed freely and voluntarily as the free act of the said Orillie Stram and Roman Stram.

RALPH N. MARBLE,
Notary Public,
Saint Louis Co., Minnesota.

(Notarial Seal.)

479

COPY OF EXHIBIT 1.

"H."

M. C. S. (10c revenue stamp.) H. W. S.

Doc. Case 681.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 14, 1898.

480 I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy of Exhibits "A," "B," "C," "D" "F," "G," "H," "I" and "J," in the case of Thos. W. Hyde et al., vs. Frank W. Eaton et al., involving lands in Sec. 30, T. 63 No. R. 11, Duluth Land District, Minnesota, are true and literal exemplifications of the originals as they appear of record on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

BINGER HERMANN,

Commissioner of the General Land Office.

(United States General Land Office.) 481

PRAIRIE DU CHIEN,
April 1, 1886.

Mess. White & Reynolds,

Gents.—Mr and Mrs. Stram are not coming up to your place, because Mr. Eaton has been here and received a Deed from Mr. and Mrs. Stram 482 for the scrip sold to Mr. Smith about 1 1-2 years ago.

I think this will settle all further trouble.

Resp. yours,

JAC. RAFFAUF.

Indorsed on the back: "Exhibit "A." Filed Apl 6, 1886.

483

(4-535.)

DECLARATORY STATEMENT FOR CASES WHERE THE LAND IS NOT SUBJECT TO PRIVATE ENTRY

I, James Henry Power of St. Louis Co., Minn., being a single man, over 21 years and a naturalized citizen of the U. S., have, on the 15th day of July,

A. D. 1882, settled and improved the S. 1-2 of N. W. 1-4 and S. W. 1-4 of N. E. 1-4 and N. E. 1-4 of S. W. 1-4 quarter of section number 17, in township number 59 N., of range number 17 W., in the district of lands subject to sale at the land office at Duluth, Minn., and containing—160— acres,
484 which land has not yet been offered at public sale, and thus rendered subject to private entry; and I do hereby declare my intention to claim the said tract of land as a pre-emption right, under the provisions of said act of 4th September, 1841.

Given under my hand this 2nd day of Oct., A. D. 1882.

JAMES HENRY POWER.

In presence of

Ag. M. DONCLE.

485 (9402-10 M.)

Indorsed on the back: "James Henry Power. No. 2929 Unoff.

Filed Oct. 2-82, by J. Grady.

"Exhibit B."

486

STATE OF MINNESOTA, COUNTY OF ST. Louis.—ss.

Edward Byrne, James H. Powers and Joseph Clement, of said county and state, being first duly sworn, make oath and say that they have made good and substantial improvements on the following described land, to-wit: In sections twenty-nine (29) and thirty (30) in township sixty-three

(63) north of range eleven (11) west of the 4th principal meridian, located under and by virtue of Sioux half-breed scrip No. 19, Letter "E" for 160 acres and by No. 19 Letter "D" Sioux scrip, issued to Orillie Stram (formerly Orillie Moreau) for and under the personal direction of Frank W. Eaton, attorney in fact of said Orillie Stram and Roman 487
Stram, her husband, and have made no improvements on said land either for themselves, or any other person, intending to claim the same under the Homestead or Pre-emption law, or for any purpose whatever, other than above described, and to our certain knowledge there is or has not been any improvements made on above described lands, by any other person or persons.

EDWARD BYRNE,
JAMES H. POWER, 488
JOSEPH CLEMENT.

Sworn to and subscribed before me
this second day of July, A. D. 1883.

CHAS. R. HAINES,
Notary Public, St. Louis Co., Minn.

(Notarial Seal.)

Indorsed on back: "Exhibit C." 86-99065-12.

489

STATE OF MINNESOTA, COUNTY OF ST. Louis.—ss.

James H. Powers, being duly sworn, deposes and says that he is well acquainted with the parcel of land included in the following described boundaries, commencing on quarter post on east side of section No. twenty-five of township No. sixty-three north of range No. twelve west in the

district of lands subject to entry at Duluth, Minnesota, thence north 80 rods, thence east 80 rods, thence north 80 rods, thence east 80 rods, thence south 80 rods, thence east 80 rods, thence south 80 rods, thence west 240 rods to place of beginning, being unsurveyed land, attempted to be located under Sioux half-breed scrip No. 19 E. issued
490 under the Act of Congress, approved July 17, 1854, entitled "An Act to authorize the President of the United States to cause to be surveyed the tract of land in the territory of Minnesota, belonging to the half-breeds or mixed bloods of the Dacotah or Sioux nation of Indians and for other purposes" in the name of Orillie Moreau, June 16th, 1883, and the other tract or parcel of land included within the following boundary lines commencing 240
491 rods east of the quarter post on east side of said section No. twenty-five of township No. sixty-three north of range No. twelve west, aforesaid, thence south 80 rods, thence east 80 rods, thence north 80 rods, thence east 80 rods, thence north 160 rods, thence west 80 rods, thence south 80 rods, thence west 80 rods, thence south 80 rods to the place of beginning, being unsurveyed land, attempted to be located under Sioux half-breed scrip No. 19 D., under said hereinbefore mentioned Act of Congress, in the name of Orillie Moreau, on said
492 16 day of June, 1883, and was so acquainted with said parcels of land June 16, 1883. That this deponent, Edward Byrne and Joseph Clement, made the improvements and all the improvements made on said parcel of land, commencing the same on or about the second day of June, 1883, and closing the same on or about the twenty-fourth day of June, 1883, that neither this deponent nor said Byrne or Clement were in the employ nor

did they make said improvements in the service or under the personal supervision or direction of said Orillie Moreau, nor of any agent or attorney of hers, nor was said Orillie Moreau or any other Sioux half-breed Indian, at any time while said improvements were being made, upon said parcels of lands nor was there any agent or attorney of said Orillie Moreau in any manner concerned in making said improvements on said parcels of land. Deponent further says that at the time they made said improvements, he and said Byrne made them intending and purposing this deponent to take the second above described parcel of land as his homestead and said Byrne to take said first above described parcel of land as his homestead, under the Act of Congress commonly known as the homestead law, and further, deponent says not. 493 494

JAMES H. POWER,

Subscribed and sworn to before me
this 8th day of August, 1884.

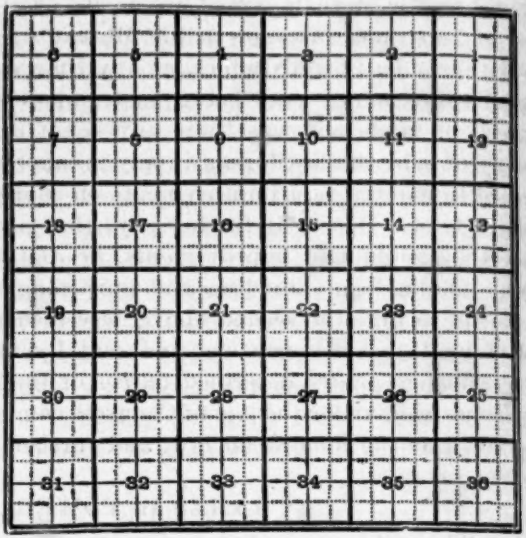
CHARLES J. BOWER,
Notary Public, St. Louis Co., Minn.

(Notarial Seal.)

(Indorsed on back) "Exhibit D., U. S. Land Office, Duluth, Minn. Affidavit of James H. Powers, Thomas W. Hyde and Angus McDonald vs. Orillie Stram, nee Moreau. Filed Oct. 9th, 1884, J. R. Carey, Reg." 495

Township No. 63 N., Range No. 11 W., 4th P. M.

496



497

STATE OF MINNESOTA, COUNTY OF ST. Louis.—ss.

U. S. LAND OFFICE,
Duluth, Minn.

498

In the matter of the application of Orillie Stram, formerly Orillie Moreau, to locate Sioux half-breed scrip No. 19 Letter D., for one hundred sixty acres of land.

Frank W. Eaton being duly sworn on his oath, says that he is the attorney in fact of said Orillie Stram, and is duly authorized by her to locate the scrip above described, and that he has so located the same as such attorney in fact on

the following described unsurveyed real estate within the limits of the Duluth Land district, to-wit:

Commencing at the quarter post on the east line of section twenty-five (25), town sixty-three (63) north of range twelve (12) west of the fourth principal meridian, thence north on said section 499
line 80 rods (80), thence east eighty (80) rods, thence north eighty rods (80), thence east eighty (80) rods, thence south eighty (80) rods, thence east eighty (80) rods, thence south eighty (80) rods, thence west two hundred and forty (240) rods to the place of beginning, which said property when surveyed will be described as follows, to-wit: The northeast quarter of the northwest quarter (N. E. 1-4 of N. W. 1-4) the south half of the northwest quarter (S. 1-2 of N. W. 1-4) and the 500
southwest quarter of the northeast quarter (S. W. 1-4 of the N. W. 1-4) of section thirty (30) in township sixty-three (63) north of range eleven (11) west of the fourth principal meridian. That he has as such attorney built upon said land a dwelling house fourteen by sixteen feet, one story high, built of timber and covered with split shingles with door and windows, and had cleared ready for cultivation one-half acre of said land. That said improvements were made under the personal 501
direction of said Orillie Stram and for her personal use and benefit and under and by authority of said power of attorney hereto attached.

FRANK W. EATON.

Sworn and subscribed before me this
16th day of June, A. D. 1883.

J. R. CAREY,
Register.

Scrip Certificate No. 19 D. Register and Receiver's No. .....

SIOUX HALF-BREED RESERVE AT LAKE PEPIN

Act of July 17, 1854.

502 LAND OFFICE,

Duluth, Minnesota, June 16, 1883.

We hereby certify, that the attached half-breed scrip, No. 19 Letter D., was on this day received at this office from Orillie Stram, of Crawford county, State of Wisconsin, by F. W. Eaton, her attorney in fact.

J. R. CAREY,
Register.

W. W. SPALDING,
503 Receiver.

I, Orillie Stram, formerly Orillie Moreau of Crawford county, State of Wisconsin, hereby apply to locate, and do locate, the following unsurveyed tract of land, designated as follows, to-wit: Commencing at the quarter post on the east line
504 of section twenty-five (25), town sixty-three (63), north of range twelve (12) west of the fourth principal meridian, thence north on said section line eighty rods, thence east eighty rods, thence north eighty rods, thence east eighty rods, thence south eighty rods, thence east eighty rods, thence south eighty rods, thence west two hundred and forty rods to the place of beginning, containing one hundred sixty acres, in the district of lands, subject to sale at the Land Office at Duluth, Minn.,

in satisfaction on the attached scrip No. 19 Letter D., issued under the Act of Congress, July 17th, 1854.

Witness my hand and seal this 16th day of June, 1883.

ORILIE STRAM, by (Seal.)

Attest: 505

F. W. EATON,
Her Attorney in Fact.

LAND OFFICE,
Duluth, Minn., June 16, 1883.

We hereby certify, that the annexed scrip No. 19 Letter D., has been this day located on the unsurveyed tract of land, as described within, containing one hundred sixty (160) acres, agreeably to the Act of Congress of July 17, 1854, and by the party duly authorized to make such location. 506

J. R. CAREY,
Register.

W. W. SPALDING,
Receiver.

507

(Indorsed on back.)

Land Office, Duluth, Minn., June 16, 1883.

Richard Fagan being duly sworn, says: I am acquainted with the unsurveyed tract of land described within, by personal examination of the same, on the tenth 10th day of June, 1883,and that there was no person living on the same at that

time, nor were there any improvements on it, except those of Orillie Stram, nor any person claiming said tract.

RICHARD FAGAN.

Sworn and subscribed before me
this 16th day of June, 1883.

508 J. R. CAREY,
Register.

Scrip Certificate No. 19 D. Register and Receiver's No. 188.

SIOUX HALF-BREED RESERVE AT LAKE PEPIN.

509 Act of July 17, 1854.

LAND OFFICE, July 21st, 1885.

We hereby certify, that the attached half-breed scrip No. 19 Letter D., was on this day adjusted by Orillie Stram, formerly Orillie Moreau, St. Louis county, State of Minnesota.

G. G. HARTLEY,
Register.
E. G. SWANSTROM,
Receiver.

510

I, Orillie Stram, formerly Orillie Moreau, of Crawford County, State of Wisconsin, hereby apply to locate, and do locate, the.....tract of land, designated as follows, to-wit: Lots number three (3), five (5), and six (6), and southeast quarter of northwest quarter of section thirty (30) in town-

ship number sixty-three (63) north of range eleven (11) west of 4th principal meridian.

(The above location is hereby made to adjust to the U. S. survey of the location made June 16th, 1883, upon unsurveyed land of half-breed scrip, No. 19 Letter D., issued under the Act of Congress July 17th, 1854.) 511

Containing one hundred sixty-one and 67-100 acres, in the district of lands subject to sale at the Land Office at Duluth, Minn., in satisfaction of the attached scrip No. 19 Letter D issued under the Act of Congress, July 17th, 1854.

Witness my hand and seal this 21st day of July, 1885.

ORILIE STRAM, (Seal.)
By F. W. EATON, 512
Her Attorney in Fact.

Attest:
N. B. THAYER.

Cancelled by Dept. Decision of Feby. 18, 1889, affirming ours of March 7, 1887.

See to R. & R., Feby. 19, 1889.

E. S. E.

513

LAND OFFICE,
July 21st, Duluth, 1885.

We hereby certify, that the annexed scrip, No. 19 Letter D., has been this day adjusted on the tract of land, as described within, containing 161. 61-100 acres, agreeably to the Act of Congress

of July 17, 1854, and by the party duly authorized to make such location.

G. G. HARTLEY,
Register.

E. G. SWANSTROM,
Receiver.

514 Excess receipt No. 7762 for $1.61-100 acres at $1.25 per acre, $2.00.

(Indorsed on the back as follows.)

See to James A. George, April 18, 1895.
Land Office,..... 187 33332
See to James A. George, April 30, 1895.
515 A. M. H.
being duly sworn says: I am acquainted with the.....tract
See to R. & R., May 18, 1895, telegram, Div "A."
A. M. H.
of land described within, by personal examination of the same
See to Geo. J. Lonstorf, May 6 and 18, 1895,
A. M. H.
516 on the .....day of.....187... and that there was no person
See to R. and R., Aug. 2, 1895, enclosing scrip.
A. M. H.
living on the same at that time, nor were there any improve-
See to Burdette Thompson and Low, Aug. 5, 1895.
A. M. H.
ments on it except those of..... nor any person claiming

See to James A. George, Aug. 5, 1895.

A. M. H.

said tract

Sworn and subscribed before me this.....
day of .....of.....187...

.....

Register. 517

(Also indorsed.)

Exhibit F.

Filed Apl 14, 1886. R. & R. No. 187. "C" to R. and R., Dec. 30-95.

518

U. S. Land Office, Duluth, Minn., July 21st, 1885, "C" to Hon. Edward "C" Stringer.

Feby. 19, 1896, as to delivery of this scrip Sioux half-breed scrip certificate 19 D., Register No. 188. Located by F. W. Eaton, attorney in fact for Orillie Moreau. Sec. 30, Tp. 63 N., R. 11 W. 519

Noted on scrip record.

Cancelled by Dept. decision of Feby. 18, 1889, affirming ours of Mch 7-87. See to R. & R., Feby. 19, 1889. E. S. E. Div. "H." Posted in tract Book, Sept. 9-1885.

Cancellation noted June 4-89. M. P. W.

See to R. & R., April 17, 1885. A. M. H.

(Over.)

9-250.

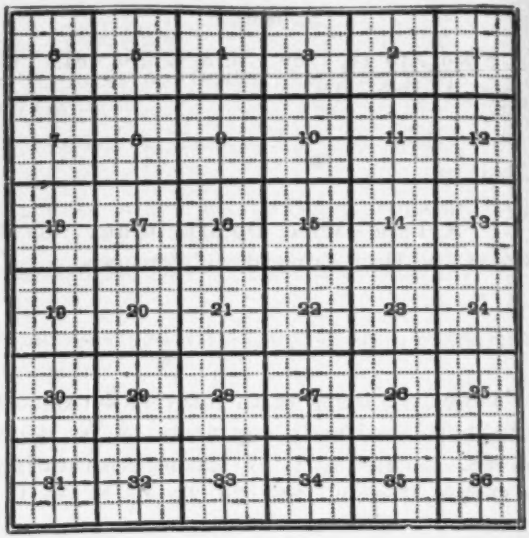
86-99065-14.

"C" to Secretary, Sept. 17, 1895.

520

Township No. 63 N., Range 11 W., 4th P. M.

521



522

U. S. LAND OFFICE,
Duluth, Minn.

STATE OF MINNESOTA, COUNTY OF ST. Louis.—ss.

In the matter of the application of Orillie Stram to locate Sioux half-breed scrip No. 19, Letter E., for 160 acres of unsurveyed land. 523

Richard Fagan, being first duly sworn on his oath, says that he is acquainted with Frank W. Eaton and with the land described above. That he has been upon said land and knows the character of the improvements thereon and that such improvements consist of a one story dwelling house, fourteen by sixteen feet, with door and window, and shingle roof, that there is cleared on said land about one-half acre.

RICHARD FAGAN. 524

Sworn and subscribed before me
this 16th day of June, A. D. 1883.

J. R. CAREY,
Register.

U. S. LAND OFFICE,
Duluth, Minn.

STATE OF MINNESOTA, COUNTY OF ST. 525 Louis.—ss.

In the matter of the application of Orillie Stram, formerly Orillie Moreau, to locate Sioux half-breed scrip No. 19, Letter E., for one hundred sixty acres of land.

Frank W. Eaton, being duly sworn on his oath says, that he is the attorney in fact of said Orillie Stram,

and is duly authorized to locate for her the scrip above described, and that he has so located the same upon the following described unsurveyed land in the Duluth Land District, to-wit: Starting at the quarter post on the east line of section twenty-five (25) in town sixty-three (63) north of
526 range twelve (12), west of the fourth principal meridian, thence east two hundred and forty rods (240) to the place of beginning of the land located, thence south eighty (80) rods, thence east eighty (80) rods, thence north eighty (80)rods, thence east eighty (80) rods, thence north one hundred sixty rods, thence west eighty (80) rods, thence south eighty(80)rods,thence west eighty (80) rods, thence south eighty (80) rods, to the place of beginning, which said land when surveyed will be described
527 as follows, to-wit: The southeast quarter of the northeast quarter(S. E. 1-4 of N. E. 1-4), the northeast quarter of the southeast quarter (N. E. 1-4 of S. E. 1-4) of section thirty (30), and the west half of the northwest quarter (W. 1-2 of N. W. 1-4) of section twenty-nine (29), in town sixty-three (63) north of range eleven (11) west of the fourth principal meridian, that he has as such attorney, built upon said land a dwelling house fourteen by sixteen feet, one story high, built of timber and
528 covered with split shingles with door and windows, and has cleared ready for cultivation one-half acre of said land.

That said improvements were made under the personal direction of said Orillie Stram and for her personal use and benefit and under and by authority of said power of attorney hereto attached.

FRANK W. EATON.

Sworn and subscribed before me
this 16th day of June, A. D. 1883.

J. R. CAREY,
Register.

529

U. S. LAND OFFICE,
Duluth, Minn.

STATE OF MINNESOTA, COUNTY OF ST. Louis —ss.

Richard Fagan, being duly sworn on his oath, says, that he is acquainted with Frank W. Eaton, the affiant in the affidavit hereto attached, that he is acquainted 530
with the land described in said affidavit, and has been on the said land, that he has read said affidavit and knows the contents thereof and knows of his own knowledge that the improvements therein described have been made as therein described and are not on the said land, and the statements in said affidavit, made in regard to said improvements are correct.

RICHARD FAGAN.

Sworn and subscribed before me 531
this 16th day of June, A. D. 1883.

J. R. CAREY,
Register.

Scrip Certificate No. 19 E. Register and Receiver's No. .....

SIOUX HALF-BREED RESERVE AT LAKE PEPIN.

Act of July 17, 1854.

LAND OFFICE, Duluth, Minn.,
July 16, 1883.

532 We hereby certify, that the attached half-breed scrip No. 19, Letter E., was on this day received at this office from Orillie Stram of Crawford County, State of Wisconsin, by Frank W. Eaton, her attorney in fact.

J. R. CAREY,
Register.

W. W. SPALDING,
Receiver.

533 ———

I, Orillie Stram, formerly Orillie Moreau, of Crawford County, State of Wisconsin, hereby apply to locate, and do locate, the unsurveyed tract of land, designated as follows, to-wit: Starting at the quarter post on the east line of section twenty-five (25) in town sixty-three (63) north of range twelve (12) west of the fourth principal meridian, thence east two hundred forty rods to the place
534 of beginning of the land located, thence south eighty (80) rods, thence east eighty (80) rods, thence south eighty (80) rods, thence east eighty (80) rods, thence north one hundred sixty rods, thence west eighty (80) rods, thence south eighty (80) rods, thence west eighty (80) rods, thence south eighty (80) rods to the place of beginning, containing one hundred sixty (160) acres, in the District of Lands subject to sale at the Land Office at Duluth, Minn., in satisfaction of the at-

tached scrip No. 19, Letter E., issued under the Act of Congress, July 17th, 1854.

Witness my hand and seal this 16th day of June, 1883.

ORILLIE STRAM, (Seal.)
By F. W. EATON,
Her Attorney in Fact. 535

Attest:

LAND OFFICE, Duluth, Minn.,
June 16, 1883.

We hereby certify, that the annexed scrip, No. 19, Letter D., has been this day located on the unsurveyed tract of land, as described within, containing one hundred sixty (160) acres, agreeably to the Act of Congress of July 17, 1854, and by the party duly authorized to make such location. 536

J. R. CAREY,
Register.
W. W. SPALDING,
Receiver.

537

Indorsed on the back as follows:

LAND OFFICE, Duluth, Minn.,
June 16, 1883.

Richard Fagan, being duly sworn, says: I am acquainted with the unsurveyed tract of land described within, by personal examination of the same on the ninth (9th) day of June, 1883, and that there was no person living on the same at

that time, nor were there any improvements on it, except those of Orillie Stram nor any person claiming said tract.

RICHARD FAGAN.

Sworn and subscribed before me this 16th day of June, 1883.

538 J. R. CAREY,
Register.

Scrip Certificate No. 19 E. Register and Receiver's No. 187.

SIOUX HALF-BREED RESERVE AT LAKE PEPIN.

539 Act of July 17, 1854.

LAND OFFICE, Duluth, Minn.,
July 21st, 1885.

We hereby certify, that the attached half-breed scrip No. 19 D., Letter D., was on this day adjusted at this office for Orillie Moreau of St. Louis County, State of Minnesota.

G. G. HARTLEY,
Register.

540 E. G. SWANSTROM,
Receiver.

I, Orillie Stram, formerly Orillie Moreau, of Crawford County, State of Wisconsin, hereby apply to locate, and do locate, the tract of land designated as follows, to-wit: Lots number one (1),

and two (2) and southwest quarter of northeast quarter and northwest quarter of southeast quarter of section thirty (30) north, of range eleven (11) west of the 4th principal meridian.

(The above location is hereby made to adjust to the U. S. survey the location made June 16th, 1883, upon unsurveyed land of half-breed scrip 541
No. 19, Letter E., issued under the Act of Congress July 17, 1854.)

Containing one hundred and fifty-two acres, in the District of Lands, subject to sale at the Land Office at Duluth, Minn., in satisfaction of the attached scrip, No. 19, Letter E., issued under the Act of Congress, July 17th, 1854.

Witness my hand and seal this 21st day of July, 1885.

ORILLIE STRAM, (Seal.) 542
By F. W. EATON,
Her Attorney in Fact.

Attest:

N. B. THAYER.

Cancelled by Dept. decision of Feby. 18, 1889, affirming office decision of March 7-87. See to R. & R., Feby. 19, 1889.

543

LAND OFFICE, Duluth, Minn.,
July 21st, 1885.

We hereby certify, that the annexed scrip, No. 19, Letter E, has been this day located on the ....tract of land, as described within, containing 152 acres, agreeably to the Act of Congress of July

17, 1854, and by the party duly authorized to make such location.

G. G. HARTLEY,
Register.

E. G. SWANSTROM,
Receiver.

544

(Indorsed on back as follows.)

Land Office,..... 187
See to James A. George, April 18, 1895.
33332
being duly sworn says: I am acquainted with
the.....tract
545 See to James A. George, April 30, 1895.
A. M. H.
of land described within, by personal examination of the same
See telegram May 18, 1895, to R. & R. calling for report Div. A. A. M. H.
on the .....day of.....187... and that there was no person
See to Geo. L. Lonstorf, May 6 and 18, 1895,
A. M. H.
546 living on the same at that time, nor were there
See to R. and R., Aug. 2, 1895, enclosing scrip.
A. M. H.
any improvements on it except those of...nor any
See to Burdette Thompson and Low, Aug. 5, 1895.
A. M. H.
person claiming said tract.
See to James A. George, Aug. 5, 1895.
A. M. H.

Sworn and subscribed before me this.....
day of.....187....

.....
Register.

547

(Also indorsed on back as follows.)

Exhibit F. Filed Apl. 14-86. R. & R., No. 188 "C" to R. & R., Dec. 30-95.

U. S. Land Office, Duluth, Minn., July 21, 1885. "C" to Hon. E. C. Stringer as to delivery of this scrip, Feby. 19-96. Sioux half-breed scrip 548
certificate, 19 E., Register's No. 187. Located by F. W. Eaton, attorney in fact for Orillie Moreau Sec. 30, Tp. 63, N. R. 11, W. Noted on Scrip records H. Cancelled by Dept. decision of Feby. 18, 1889, affirming ours of Mch 7-87. See to R. & R. Feby. 19-89, E. S. E. Div. "H." Posted on tract book Sept 9-85. Cancellation noted June 4-89. J. M. R. W. P. W. See to R. & R., April 17, 1895, A. M. H. 9-230. 86-99065.

(Over.)

549 "C" to Secretary, Sept. 17, 1895.

This indenture made this 31st day of March, in the year of our Lord one thousand eight hundred and eighty-six, between Orillie Stram (before marriage Orilie Moreau) and Roman Stram, her husband, of Crawford County and State of

Wisconsin, parties of the first part, and Frank W. Eaton, of Duluth, St. Louis County, State of Minnesota, party of the second part.

Witnesseth, that whereas, the said Frank W. Eaton, as our duly constituted and appointed attorney in fact, did on the 16th day of June, A. D.
550 1883, caused to be filed in the U. S. Land Office at Duluth, Minnesota, an application for certain lands and Sioux half-breed scrip, No. 19 D., and No. 19 E., each for 160 acres of land, thereby by virtue of the laws of the United States and conditions precedent which had been complied with by the said Frank W. Eaton, our attorney in fact as aforesaid, vesting the title to the said land as described in said application by metes and bounds in me, the said Orillie Stram (the said
551 description being by metes and bounds for the reason that the said land had not yet been surveyed by the United States) which said land has since been surveyed by the government and a plat thereof filed in the United States Land Office at Duluth, Minnesota, and upon said plat the aforesaid scrip and entry was adjusted July 21st, A. D. 1885, thereby specifically and perfectly describing the land filed upon for me, the said Orillie Stram, by the said Frank W. Eaton, and intended to be en-
552 tered on June 16th, A. D. 1883, in the name of me, the said Orillie Stram, by our attorney in fact, the said Frank W. Eaton, and

Whereas, we, the said Orillie Stram and Roman Stram, did on the 25th day of May, A. D. 1883, by two certain powers of attorney, duly executed, acknowledged and delivered by us to Leonidas Merritt, of Duluth, St. Louis County, State of Minnesota, which said powers of attorney were duly recorded in the office of the Regis-

ter of Deeds, for St. Louis County, Minnesota, in Book "A" of Powers of Attorney, on pages 613 and 614 therein and thereby constituting and appointing the said Leonidas Merritt the attorney in fact of the said Orillie Stram, with full power and authority in her name and stead to grant, bargain, sell, demise, lease, convey and confirm the said lands which we then owned or which we might thereafter acquire, or become seized of under and by virtue of locations of Sioux half-breed scrip No. 19 E., for 160 acres of land and No. 19 D., for 160 acres of land, issued to me, the said Orillie Stram, and 553

Whereas, the said Leonidas Merritt, as our attorney in fact, on the 30th day of October, A. D. 1885, did by Warranty Deed, duly executed by him, convey to the said Frank W. Eaton, an undivided seven-ninths part and interest in the said lands which, according to the said survey and plat and in said deed are described as follows, to-wit: "All of the following pieces, parcels and tracts of land situate in the Counties of St. Louis and Lake, in the State of Minnesota, described as follows, to-wit: Lots one (1), two (2), three (3), five (5) and six (6), the southwest quarter of the northeast quarter, the southeast quarter of the northwest quarter and the northwest quarter of the southeast quarter, all being in section thirty (30) in township No. sixty-three (63) north of range eleven (11) west of the 4th principal meridian in Minnesota, containing according to the government survey three hundred thirteen and 61-100 (313.61) acres of land, more or less, which said warranty deed was upon the 3rd day of November, A. D. 1885, at 2 o'clock P. M., duly recorded in the office of the Register of Deeds 554 555

for St. Louis County, Minnesota, in Book A. 3 of Deeds, for the County of Lake in the State of Minnesota, on the 5th day of December, A. D. 1885, at 3 o'clock P. M., in Book D., of Deeds, page 205. Now therefore, we, the said Orillie Stram and Roman Stram, parties of the first part, do
556 hereby fully ratify and confirm the said conveyance of said land as above described to the said Frank W. Eaton, by our said attorney in fact, the said Leonidas Merritt and do hereby and herein fully ratify and confirm all and every act, conveyance made and matter and thing done by our said attorney in fact, Leonidas Merritt, under and by virtue of the said power of attorney as aforesaid. For the purpose of more effectually ratifying and confirming the acts of our said attorney,
557 Leonidas Merritt, and in consideration of the sum of one (1) dollar to us in hand paid, by the said party of the second part, the receipt whereof is hereby confessed and acknowledged have granted, bargained, sold and conveyed and by these presents do grant, bargain, sell and convey unto the said Frank W. Eaton, party of the second part, his heirs or assigns, forever, an undivided seven-ninths part and interest i nthe following described tracts, pieces or parcels of land situate in the Counties of St. Louis and Lake and State of Min-
558 nesota, known and described as follows, to-wit:

Lots one (1), two (2), three (3), five (5) and six (6), the southwest quarter of the northeast quarter, the southeast quarter of the northwest quarter and the northwest quarter of the southeast quarter, all being in section thirty (30) in township No. sixty-three (63) north of range No. eleven (11) west of the 4th principal meridian in Minnesota, containing according to the government sur-

vey three hundred thirteen and sixty-one hundredths (313.61) acres, more or less.

To have and to hold the same together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining to the said party of the second part, his heirs and assigns forever, and the said parties 559
of the first part for their heirs, executors and administrators, do covenant with the said party of the second part, his heirs and assigns forever, that they are well seized in fee of the said land and premises aforesaid, and have good right to sell and convey the said land in manner and form aforesaid and that the same is free and clear from all incumbrances; and the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and as- 560
signs, against all persons lawfully claiming or to claim the whole or any part thereof, the said parties of the first part will warrant and defend.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

ORILLIE STRAM, (Seal.)
Formerly Orilie Moreau.

ROMAN STRAM.

Signed and delivered in pres- 561
ence of

JAC. RAFFAUF.
ALEX. RAFFAUF.

STATE OF WISCONSIN, COUNTY OF CRAWford.—ss.

I, Jac Raffauf, a notary public within and for said county, do hereby certify that on this 31st day of March, A. D. 1886, personally came before me Orillie Stram, formerly Orillie Moreau,
562 and Roman Stram, her husband, to me well known to be the same persons described in and who executed the foregoing instrument and they acknowledged that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

JAC. RAFFAUF,
Notary Public, for
(Seal.) Crawford Co., Wisconsin.

563

OFFICE OF REGISTER OF DEEDS.

STATE OF MINNESOTA, COUNTY OF ST. Louis.—ss.

I hereby certify that the within instrument was filed in this office for record on the 24th day of April A. D., 1886, at 8 o'clock A. M., and was duly recorded in Book D. of Deed Records, page 264 and 265.

564 G. A. SCHULZE,
Register of Deeds.
By.....Deputy.

EXHIBIT H.

Warranty deed and confirmation. Orillie Stram and husband, to Frank W. Eaton.

OFFICE OF REGISTER OF DEEDS.

STATE OF MINNESOTA, COUNTY OF ST. Louis.—ss.

I hereby certify that the within deed was filed in this office for record on the 3rd day of April, A. D. 1886, at 10 o'clock A. M., and was duly recorded in Book 8 of Deeds, page 46. 565

FRANK BURKE, JR.,
Register of Deeds.

By.....Deputy.

Not entered for taxation this.....
day of.....A. D. 18....
.....
County Auditor.

566

Know all men by these presents, that Orillie Stram, formerly Orillie Moreau, and Roman Stram, her husband, of Crawford County, and State of Wisconsin, of the..... ..... have made, constituted and appointed, and by these presents do make, constitute and appoint Leonidas Merritt of St. Louis County, in the State of Minnesota, our true and lawful attorney for us, or each of us individually, 567 and in our name, place and stead, to enter into and upon, and take possession of any and all pieces and parcels of land or the timber and other materials thereon, in the State of Minnesota which we now own, or which we may hereafter acquire or become seized of, or in which we may now or hereafter be in anyway interested; under and by virtue of location of Sioux (or Dakota) half-breed scrip No. 19, Letter "D" for 160 acres, issued to

the said Orillie Moreau, now Orillie Stram, under Act of July 17, 1854, United States statutes at large, page 304, chapter 83, authorizing the issuance of said scrip in exchange for lands of the Sioux half-breed reserve at Lake Pepin, Minnesota; and to prosecute and defend any and all
568 suits at law, for us, and each of us individually, in the courts of said State of Minnesota, or of the United States, relating to the title to said lands; we further authorize and empower our said attorney to grant, bargain, sell, demise, lease, convey and confirm said land, or any part thereof, or the right to sever and remove timber and other materials therefrom, to such person or persons, and for such prices as to our said attorney shall seem meet and proper, and thereupon to execute,
569 acknowledge and deliver in our name and on our behalf any deeds, leases, contracts or other instruments, sealed, or unsealed, and with or without covenants and warranty, as to him shall seem meet to carry out the foregoing powers; with full power to our said attorney to appoint a substitute or substitutes to perform any of the acts which our said attorney is by this instrument authorized to perform, with the right to revoke such appointments at pleasure. Hereby giving and granting to our said attorney or his substi-
570 tute or substitutes full power to do and perform anything proper or convenient in carrying out and executing said powers, as fully as we, or each of us individually, could do if personally present and acting in the premises. And we do further authorize and empower our said attorney, from time to time and at all or any time hereafter, to make and execute, or cause to be made and executed any such further deeds, conveyances, de-

mises or leases to said lands or any part thereof, for the further and more perfect assurance and confirmation of the title to said premises, to the purchaser or purchasers, their heirs or assigns.

And we hereby revoke all powers of attorney by us heretofore made, authorizing any person to do any act relative to any part of said lands. 571

Hereby ratifying and confirming whatsoever our said attorney or any substitute appointed by him may do in the premises by virtue thereof.

In witness whereof, we have set our hands and seals this twenty-fifth day of May, A. D. 1883

ORILLIE STRAM, (Seal.)
Formerly Orillie Moreau, Scripee.

ROMAN STRAM, (Seal.) 572

Signed, sealed and delivered in presence of
JAC. RAFFAUF.
LYDIA LEROUX.

STATE OF WISCONSIN, COUNTY OF CRAWFORD—ss.

Be it remembered, that on this 25th day of 573 May in the year one thousand eight hundred and eighty-three, before me, Jac. Raffauf, a notary public, within and for said County and State personally appeared Orillie Moreau, now Orillie Stram, and Roman Stram, her husband, well known to me to be the persons who are described in and who executed the within and foregoing instrument, and severally duly acknowledged to me, that they executed the same freely. And the

said Orillie Stram, formerly Orillie Moreau, who is described as a married woman, and whose name is subscribed to the within and foregoing instrument, upon an examination without the hearing of her husband, being first by me made acquainted with the contents of said instrument, thereupon acknowledged to me that she executed the same
574 freely, and that she did not wish to retract such execution.

In witness whereof I have hereunto set my hand and official seal at said county, the day and year above written.

JAC. RAFFAUF,
Notary Public,
(Seal.) Crawford County, Wisconsin.

575

Indorsed on back:

EXHIBIT I, 3831.

OFFICE OF REGISTER OF DEEDS, COUNTY of Saint Louis.—ss.

576 I hereby certify that the within power of attorney was filed in this office for record on the 22nd day of June, A. D. 1883, at 2 o'clock P. M., and was duly recorded in Book A. of Power of Attorney, page 63.

J. A. MANNHEIM,
Register of Deeds.
By I. C. VAN NORMAN,
Deputy.

19 D. LAKE CO.

REGISTER'S OFFICE, LAKE COUNTY, MINN.

—88.

Received for record this 14th day of July, A. D. 1883, at 4 o'clock P. M., and was duly recorded in Book "B" of Deeds, page 596 to 598.

PAUL F. E. WILLARD, 577
Register of Deeds.

(Seal.)

86-99065-17.

Know all men by these presents, that we, Orillie Stram, formerly Orillie Moreau, and Roman Stram, her husband, of Crawford County, and State of Wisconsin, of the..... 578 ..... have made, constituted and appointed, and by these presents do make, constitute and appoint Leonidas Merritt of St. Louis County, in the State of Minnesota, our true and lawful attorney for us, or each of us individually, and in our name, place and stead, to enter into and upon, and take possession of any and all pieces and parcels of land or the timber and other materials thereon, in the State of Minnesota which we now own, or which we may hereafter acquire 579 or become seized of, or in which we may now or hereafter be in anyway interested; under and by virtue of location of Sioux (or Dakota) half-breed scrip No. 19, Letter "E" for 160 acres, issued to the said Orilie Moreau, now Stram, under Act of July 17, 1854, United States statutes at large, page 304, chapter 83, authorizing the issuance of said scrip in exchange for lands of the Sioux half-breed reserve at Lake Pepin, Minne-

sota; and to prosecute and defend any and all suits at law, for us, and each of us individually, in the courts of said State of Minnesota, or of the United States, relating to the title to said lands; we further authorize and empower our said attorney to grant, bargain, sell, demise, lease, convey and confirm said land, or any part thereof, or
580 the right to sever and remove timber and other materials therefrom, to such person or persons, and for such prices as to our said attorney shall seem meet and proper, and thereupon to execute, acknowledge and deliver in our name and on our behalf any deeds, leases, contracts or other instruments, sealed, or unsealed, and with or without covenants and warranty, as to him shall seem meet to carry out the foregoing powers; with full power to our said attorney to appoint a substi-
581 tute or substitutes to perform any of the acts which our said attorney is by this instrument authorized to perform, with the right to revoke such appointments at pleasure. Hereby giving and granting to our said attorney or his substitute or substitutes full power to do and perform everything proper or convenient in carrying out and executing said powers, as fully as we, or each of us individually, could do if personally present and acting in the premises. And we do further
582 authorize and empower our said attorney, from time to time and at all or any time hereafter, to make and execute, or cause to be made and executed any such further deeds, conveyances, demises or leases to said lands or any part thereof, for the further and more perfect assurance and confirmation of the title to said premises, to the purchaser or purchasers, their heirs or assigns.

And we hereby revoke all powers of attorney by us heretofore made, authorizing any person to do any act relative to any part of said lands.

Hereby ratifying and confirming whatsoever our said attorney or any substitute appointed by him may do in the premises by virtue thereof.

In witness whereof, we have set our hands and seals this twenty-fifth day of May, A. D. 1883. 583

ORILIE STRAM, (Seal.)
Formerly Orillie Moreau, Scripee.
ROMAN STRAM, (Seal.)

Signed, sealed and delivered in presence of
JAC. RAFFAUF, (Seal.)
LYDIA LEROUX, (Seal.)

584

STATE OF WISCONSIN, COUNTY OF CRAWFORD—ss.

Be it remembered, that on this 25th day of May, in the year one thousand eight hundred and eighty-three, before me, Jac. Raffauf, a notary public, within and for said County and State personally appeared Orilie Stram, and 585
Roman Stram, her husband, well known to me to be the persons who are described in and who executed the within and foregoing instrument, and severally duly acknowledged to me, that they executed the same freely. And the said Orillie Stram, formerly Orillie Moreau, who is described as a married woman, and whose name is subscribed to the within and foregoing instrument, upon an examination without the hearing

of her husband, being first by me made acquainted with the contents of said instrument, thereupon acknowledged to me that she executed the same freely, and that she did not wish to retract such execution.

In witness whereof I have hereunto set my
586 hand and official seal at said county, the day and year above written.

JAC. RAFFAUF,
Notary Public,
(Seal.) Crawford County, State of Wisconsin.

---

587 EXHIBIT J.

OFFICE OF REGISTER OF DEEDS, COUNTY of Saint Louis.—ss.

I hereby certify that the within power of attorney was filed in this office for record on the 22nd day of June, A. D. 1883, at 2 o'clock P. M., and was recorded in Book A. of Power of Attorney, page 614.

J. A. MANNHEIM,
Register of Deeds.
588 By I. C. VAN NORMAN,
Deputy.

19 E. ST. LOUIS CO.
86-99065-9.

COPY OF EXHIBIT 2.

F. L. C. J. T. S.
E. P.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
Washington, D. C., July 16, 1898.

589 Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of the original on file in this department.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of the department of the Interior to be affixed, the day and year first above written.

C. N. BLISS,
Secretary of the Interior.

(Department of the Interior.) 590

ORILLIE STRAM and ANGUS McDONALD,
vs.
FRANK W. EATON, and the location of S. H. B. Scrip, 19 D., on Lots 3, 5 and 6, and S. E. 1-4 of N. W. 1-4, Section 30, Township 63, 11 W. 591

U. S. LAND OFFICE,
Duluth, Minn., April 6, 1886.

Hearing ordered by Comsrs. "C" of Nov. 14, 1885, and day of same set by the Register and Receiver, for April 6th, 1886, at 10 A. M.

April 6, 1886. Case called. C. E. Shannon, representing White and Reynolds, responds for plaintiffs and R. P. Edson for defendants.

Defendant moved to dismiss on the ground that the matters set forth in the commissioners order for hearing are not matters which the Land Department properly has cognizance of, but on the contrary, are questions over which the Court alone has jurisdiction.

592 Motion overruled.

Defendant excepts to the ruling.

Plaintiff moves for continuance and supported motion by an affidavit of Fred Reynolds. Marked Ex. "A" and filed.

Motion overruled and case ordered to proceed.

April 7th, 1886.

On motion of defendant, Register and Receiv-
593 er ordered contestants to produce the original complaint or affidavit of Orillie Moreau, a copy of which is on file.

Attorneys for contestants reported that they were unable to produce the same at this date.

Attorneys for defendant thereupon objected to having the case proceeded with and moved to dismiss the hearing on the ground that the contestants refused to produce the said original complaint or affidavit.

594 At this juncture the Register and Receiver adjourned the case till April 8, 1886, 1 P. M., and telegraphed the Hon. Commissioner to ascertain if the original document alluded to was on file in the General Land Office.

April 8, 1886.

Hon. Commissioner answers that the affidavit of Orillie Moreau is on file in the General Land Office.

1 o'clock P. M., case called.

White and Reynolds, Attys. for contestant asks that the titles of the cause be so changed as to show that Angus McDonald is alone contestant, of the location and pretended entry under Sioux half-breed certificate No. 19 D., and that Orillie Stram is with other the defendant. 595

Held by the Register and Receiver that Orillie Stram, upon whose affidavit, with others, the order for hearing is based, has attacked the validity of the power of atty. and the location of the scrip and is by such action, one of the contestants of this location.

Plaintiff excepts to the ruling, and state that he appears only for McDonald.

Defendant's attorney objects to proceeding upon the copy of the affidavit of Orillie Stram 596
(Moreau) on the ground that the same is not a true copy thereof.

TESTIMONY.

James H. Power, being duly sworn on part of plaintiffs, says:

I live in Duluth, Minnesota. I am a scaler of 597
logs. In the month of June, 1883, between the 2nd and 24th thereof, I was in town 63, R. 11 W. I started there from Duluth to the best of my knowledge in the latter part of May, 1883, in company with Edward Byrne. No one else was with me going up there. After I got there Jos. Clement and Thos. Ross. The latter about two days, was with me. I went there to take up a homestead. In pursuance of this purpose I built a

shanty and partly finished it, and run the line around the location, established stakes at the different corners, writing on those stakes that that was Jas. Powers' homestead, and that was witnessed by the signature of Edward Byrne. Edward Byrne built a shanty and partly finished it and also cleared some land, run the boundary
598 line around his claim, established the corners and wrote thereon that that was his homestead and I witnessed it.

(Witness here shown a stake and upon examination of it said that he could not swear that the stake had ever been on the land in dispute. I cannot say that this is a stake from that land but the stakes were marked similar to this.

When asked if he knew the signature he said
599 that it was so defaced that he did not know it. There were marks put on both buildings on mine and marked "This is James Powers' homestead, taken up as such and such a time, I do not remember what time exactly, and witnessess by Edward Byrne, Jos. Clement and H. R. Harvey. On Byrnes' cabin was the similar notice witnessed by myself and the parties mentioned. The township at that time I understand was not surveyed. I have forgotten what section our lands were
600 in. I can't describe the location. I know where Hyde and McDonald now are and have been for the last year. They now have the same locations that Byrne and mine made, unless changed since the survey. I have not seen their improvements. I was there last about two years ago. At that time Hyde had started his shanty and McDonald had not to my knowledge.

McDonald's claim corresponded to mine and Hyde's to Burn's. I remained there about five

weeks when I made my improvements except 2 1-2 days, when I went to Vermillion. When I came away I left Byrne there. Byrne and I left the land both together, we also left the marks on the posts and buildings as they were. To the best of my knowledge we left the land the last week in June, 1883. When I left the improvements consisted of my claim, a house partly built and 601
enough cleared to get around and handle logs. On Byrne's the shanty was built and partly finished and about 1-4 of an acre cleared. I went on to the lands when Hyde and McDonald went there. I don't remember the date, but I think it was two years ago, about, this summer. There was not to my knowledge any other improvements on the land when they went there than there was when Byrne and I came away. When I was there making improvements there were Indians came there. 602
I think they were packer, they did not, to my knowledge make improvements. I made my improvements as a homestead. Mr. Byrne put the notice as regards his homestead on his shanty as soon as it was built. About three weeks before we came away. Mr. Eaton never was there when I was there, to my best knowledge, and no character there that I knew by the name of Orillie Stram. I was not in the employ of Mr. Eaton in making these improvements. I was in no one's 603
employ at that time. Joseph Clement stopped with us and worked along between us and also went to town when we would want him to. Thos. Ross helped to survey some lines. I think Mr. Eaton and Merritt employed him. To the best of my knowledge he was there three days; I helped Byrne to run my lines and all lines except what Ross run. To the best of my knowledge Ross did

not help run my lines but he helped Byrne run lines.

CROSS EXAMINED.

604 I made the Village of Duluth my home before I went up there. I had been a resident of Duluth two months. I had known Edward Byrne since I came to Duluth. I went up there at the suggestion of Edward Byrne. Edward Byrne suggested this land to me one afternoon and we started up the next morning. He told me (Byrne told me) there was a good thing on hand and asked me if I would go with him, he couldn't handle it all alone. I said I would consider the matter. That
605 is all he said to my knowledge. He never told me he was going up there to make improvements for F. W. Eaton. We were in Paddy Welch's saloon when he made the proposition. Thos. Ross was present at the conversation. I can't tell how many talks I had with him. I do not remember how many places we talked in. I talked with Jos. Clement, and Mr. Leonidas Merritt, (Eaton and Merritt) before I went up there. I went and asked Mr. Merritt his opinion. I said I was going
606 up there and he said he was glad I was going.

Q. Did you not tell Mr. Merritt at the time that Edward Byrne and you were going up there, that Byrne was to get one-third interest for making the improvements and that he was going to divide that one-third with you for going with him?

A. To my knowledge no such discourse ever passed between Merritt and myself.

Q. Did you not tell Merritt that Edward Byrne was going to divide his one-third interest he was going to get with yourself and Clement? A. No, I never told Merritt so.

Q. Will you swear positively that no such conversation ever passed between you and Merritt? A. I will, that I did not previous to my going on the land. 607

Q. Did such a conversation as that EVER occur between you and Leonidas Merritt? A. Yes, it was in Mr. Merritt's office in Duluth. I do not remember who was present. It seems to me someone came in the door but I did not turn around to see. Edward Byrne was not present to my knowledge. I don't recollect the date I went up there or when I came back. Byrnes paid my expenses, he gave me the money here in town. Mr. 608 Byrne did not describe the land to me or what the good thing was until we were half way up there. Byrne talked to me first about making a homestead. Nobody suggested to me to go to Merritt. I knew that Eaton & Merritt were in company when I went to see the latter. I don't know whether Byrne suggested anything about taking a homestead before going up there or whether it was after we got there. I had not made up my mind to anything in regard to the 609 matter until I had seen the land. I did not know what I was going to do about it when I left Duluth, if I found it worthless I was not going to take it as a homestead. I did not testify that Edward Byrne first suggested taking a homestead. I never filed on the land as a homestead. I never presented a filing for a homestead entry upon it. I never went to the Land Office to see if I could file a homestead or pre-emption and never made

any inquiries. We, Byrne and I left the land at the suggestion of Mr. Merritt. I had once filed a pre-emption before going up there. I was ignorant of the law and found out afterwards that I could not hold this land in 63, 11. I don't know what kind of a filing I had made previously to
610 going up there. Some one filed for me, all I know is that I relinquished it. I did not pay anything for it, and don't know if it was on surveyed or unsurveyed land. I can't tell when I went on the land with Hyde and McDonald. I went on there to locate them on this land. I took them up there about one year after Byrne and I came back from there. I got nothing for putting them on the land. I borrowed 20 dollars to do it with.

611 ———

Continuation of Cross-examination of James Power:

My full name is James Henry Power. I said yesterday that before I went up on the land in May, 1883, a man had used my name to file on land. I can't tell how long it was before I went up that this happened. I first discovered that this
612 man had done so soon after his doing. I was told by parties who seemed to know all about it that the land I was filed on was worthless and I never went near it. I found this out before I went up to 63, 11, with Byrne. I never signed my name to any paper of filing in the Land Office, but I think I signed a blank. A certain party came and asked me if I wanted to take a pre-emption. I said yes, but whether I filled the blank or not I don't remember. I don't know who filed it. I did not

know it was filed until some time after. The man was Mr. Grady.

Q. Did you not sign a filing paper in the U. S. Land Office in 1882, on which Angus McDonald was a witness? A. No, not in the U. S. Land Office.

Q. Did ever sign one anywhere which was witnessed by Angus McDonald or any one named McDonald? A. Not to my knowledge. 613

(Witness here shown a declaratory statement and acknowledged that he signed it). The paper was signed at Capt. Norris's. I never signed but one paper.

Defendant offered the declaratory statement in evidence marked Exhibit "B," and filed.

Q. How do you account for your testimony awhile back that somebody filed a D. S. without your knowledge or authority. A. It was filed without my knowledge. I was not present when it was filed. 614

Q. Did you direct the paper to be filed in the Land Office. A. No. I gave the paper to Mr. Grady after I signed it. I knew when I signed the paper that it was to pre-empt land.

Q. Did you sign the paper for fun or did you intend to pre-empt land when you signed it? A. I was not particular. The notices which Byrne and I put on our shanties were alike except as to names. One was that one claim was Byrne's homestead and the other was mine. I am as positive of this as regards my claim as I am of anything else I have testified to. 615

Q. Are you just as positive as regards Byrne's notice? A. I am positive that on Byrne's

shanty the notice stated that it was Byrne's homestead. The notice was written on one of the logs of the shanty near the door, on the front of the building. I know there was but one notice on my shanty, and to the best of my knowledge there was but one on Byrne's. There might have been more.

616 Q. Was not this the notice that was on Byrne's shanty "Edward Byrne (minutes of the land here) (settlement made or commenced or begun) settlement continued—" and nothing else? A. No, I never remember of seeing such a notice on that shanty. I remember when I went to Vermillion Lake after supplies. I got the supplies on an order from Byrne. I cannot recollect the amount of the order but as near as I can recollect
617 it was for pork, flour and other provisions in small quantities. It was not as much as a barrel of flour. I met Dick Fagan when I was returning with the supplies. I met him as I was going out to Vermillion Lake not over ten miles from Tower. I had a conversation with him about the land in contest.

Q. Did you tell him Eaton & Merritt were going to scrip that land? A. Not to my knowledge.

618 Q. Do you swear positively that you never told him such a thing. A. I do swear positively.

Q. When you returned to Duluth after leaving the land did you go to the office of Mendenhall & Haines with Byrnes? A. I was in that office with him. I went in first and Bryne went to change his clothes and then he came. Mr. Eaton, Merritt, Byrne, Clement and I were together. As near as I recollect a relinquishment was made out

for me to sign, *relinquishing the right to the improvements.* There were papers also made out giving me a 1-9 interest in said land. I don't remember whether it was a deed, or not. It was given me for to relinquish my right to what improvements I had on the land.

Q. Was it not given to pay you for your ser- 619
vices up there. A. No sir.

Q. Who gave you that deed. A. I understood it was Eaton & Merritt. I never saw the deed. I sold my 1-9 interest to Mr. Lonstorf of Milwaukee. (Witness here shown a paper and said that he signed it while in Mendenhall & Haines' office.) That is my signature and the paper is what I understood to be a relinquishment of my interest to the land.

620

Q. Was the paper read to you before you signed it? A. It was partly read to me.

Q. Do you read and write? A. Yes, sir.

Q. Take the paper and read what was read to you. A. I can't do it. I was under the influence of liquor at the time. I remember I went into the office before Byrne did distinctly. I then went out again and went to a saloon. Joseph Clement went with me. I don't know whether anyone else went with me or not. The saloon was 621
across the street from the office. I don't remember who I left in the office. I do not remember whether all the other parties except Byrne were in Mendenhall & Haines' office when I first went there or not. When I came from the land to Duluth, Mr. Merritt, Mr. Fagan, Mr. Clement, Mr. Byrne and others were with me, I think the place I went to was a saloon. Mr. Eaton & Clement I think were with me.

Q. Did you not go to Friedenberg's restaurant and get dinner the first place you went to. A. I remember of going to Friedenberg's and getting dinner, but do not remember whether that was the first place I went to or not. I know that the first thing I done was to take a drink.

622 Q. If you can't remember which part of that affidavit was read to you how are you able to state that but part of it was read to you? A. Because I don't remember the words "duly sworn." There may be more but this is impressed upon my memory.

Q. Now I want you to state whether the paper you claim was a relinquishment was entirely read over to you. A. I don't know.

623 Q. What paper was that was half read to you? A. The paper I put my signature to?

Q. Did you put your signature to more than one paper? A. Not to my knowledge.

Q. Was the one you put your signature to read over to you? A. I don't remember.

Q. Did you sign that paper before you left the office and went to the saloon? A. I went out to take a drink before I signed the paper.

624 Q. Your recollection then I perceive from the evidence is clearly distinct in regard to everything you did except what transpired in relation to these papers. A. No.

Q. Was you sworn to any paper in Mr. Haines' office? A. Not to my knowledge.

Q. Was the paper signed by you signed before the deeds were made out or after.

A. I don't remember.

Q. Did not Mr. Eaton after the deed to you, Byrne and Clement had been made out and passed to you, state that he wanted an affidavit from the men that made the improvements showing for what purpose they were made and for whom they were made? A. I don't remember such a proposition. 625

Q. Did not Mr. Haines write the paper that you signed in your presence and read it over after he made it to you before you signed it? A. All that makes me think he did not is that I do not remember the words "Duly sworn" there were certain papers read to me that I did not then and do not know now what they contained. I mean that they were read or partly read.

Q. Do you understand English when it is read to you? A. I do. 626

Q. Why is it that you did not know at the time what those papers contained.

A. Because I drank too much which I must admit to my shame.

Q. Who advised you to inject this drunken business into this testimony today? A. Nobody. (Same affidavit shown witness and he asked to read it over, he did so and was then asked whether the contents were true or false, and answered with emphasis that they were false. 627

Q. Do you know what kind of liquor you drank that day? A. Beer and whiskey.

Q. How many drinks does it take to get you drunk so you don't remember what you were doing? A. Circumstances alter cases.

Q. How much did you drink that day? A. I don't remember. After I got to town I drank in only two places before signing these papers.

Q. How long after you came to town was it before the business was closed with regard to these papers. A. I don't remember but it was the same day. (Affidavit referred to now offered in evidence marked Exhibit "C" and filed).

Witness now shown another affidavit purport-
628 ing to be signed by him—says: The signature is mine. I swore to that affidavit and remember the words "duly sworn" in it. I made it of my own free will.

Q. Who requested you to make this affidavit? A. Mr. White, and I made it in his office in Duluth.

Q. Did either one of the contestants ask you to make the affidavit. A. I don't think they did.

629 Q. Who got you to go and make it? A. I went of my own free will.

Q. What was your object in making it? A. Mr. White asked me some questions whether I had made any improvements on the land under any one's instruction or supervision, and I said no; which was true. He asked me if I would make affidavit to that effect and I said yes.

Q. Was you under the influence of liquor at that time? A. Not to my knowledge. No. I was
630 sober. I have examined the signature to this affidavit and the one to the other shown me this morning.

Q. Did you see anything in those signatures that indicated on the formation of the letters that you were any more intoxicated when you signed the one that you were when you signed the other. A. Yes, I see indications here in this one (Exhibit "C") that I was intoxicated when I signed.

Q. What is it you see? A. I see by the formation of the letters of the first name. I never write it so unless laboring under some temporary excitement. I think the signature to this last affidavit looks the most sober of the two. Affidavit referred to marked Exhibit "D" and offered in evidence by defendant's attorney for the purpose of showing that witness committed perjury in one or the other of the affidavits.) 631

Q. Previous to making this last affidavit how much had you received from Mr. Lonstorf for your interest in this land.

(Objected to by plaintiff's attorney on the ground that it is irrevelant.) Witness called upon by the Register and Receiver to answer the question. 632

A. I got seven hundred and fifty dollars in all. I took the money and did not care what became of him. It was immaterial to me. I had taken advice on the legality of the entry. I don't remember whether I took the advice before or after selling to Lonstorf. No one ever said the entry was illegal before I go my deed from Orillie Stram.

Q. Notwithstanding the fact that you got $750 out of Lonstorf for your interest in the land you voluntarily of your own free will and accord went to White's office (White & Bower) and made this affidavit. 633

A. Yes, I made it at White's request.

Q. How much did you get for it? A. Not a nickel, no money, no promise.

Q. You even borrowed money and gave your note for it, to go and put Hyde and McDonald on this land, did you? A. Yes, sir, and I haven't

paid the note yet, but calculate to when it is presented.

Q. Who did you borrow it of?

(Not answered.)

Q. Now don't you think you played an almighty mean caper on Lonstorf in making this
634 affidavit, and putting the contestants on the land wthout any compensation whatever? A. My answer to that is that he took his own chances.

Q. How much of this land do you expect to get if this land is made vacant? A. None.

Q. How much compensation are you to receive for coming here to testify? A. There has been no stipulated price agreed upon—but I expect pay certainly.

635 Q. Did you make the last deed after you put contestants on the land? A. I do not remember.

Q. Did you not charge Lonstorf fifty dollars for making a new deed to correct the old one? A. I told you I received $750 in all.

Q. It is not a fact that after you placed the contestants on this land you charged Lonstorf $50 for making a new deed to correct the error in the first.? A. I do not remember.

636 Q. When did you put contestants on this claim? A. In the year 1884, in the summer, the fore part of the summer to the best of my knowledge.

Q. Did you talk with Lonstorf about your improvements at the time you made the first deed? A. Not to my knowledge.

Q. Did you not tell him that you got a 1-9 interest from Mrs. Stram for making the improve-

ments for her on this land. A. I never mentioned Mrs. Stram's name.

Q. Did you not tell him that you make the improvements with Byrne for Eaton & Merritt? A. No, sir.

637

RE-DIRECT.

Q. In your cross-examination you state that you came away from the land at the suggestion of Mr. Merritt. Give us the full details of that suggestion, where the conversation took place and when it was? A. I had no conversation with Mr. Merritt and he said nothing to me about it, not to my knowledge—except that Mr. Merritt 638
told me up there that I was wealthy. I never made any change with Merritt whereby I was to let him scrip the land. I made an agreement with Merritt whereby I was to let him scrip the land. I made an agreement with Mr. Merritt through Mr. Byrne afterwards, this was on Fall Lake, I think, about 1-4 of a mile from the land just as we were starting down to Duluth. Mr. Byrne told me we would get 1-3 for our relinquishment. I made no reply as I was satisfied I could not do better. 639
There were certain circumstances which prevented me. This was the first that was said where any amount was agreed upon.

Previous to this Fagan had talked to me. Fagan & Merritt came there together the Saturday before we left. Fagan said would I be satisfied for them to scrip the land. I told him that I had heard that other parties had scripped it. And he said that it was not so, and I told him

then that I took it up as a homestead and wanted something out of it. He said that I held the pre-emption and could not hold a homestead, and said that it was his intention to expose me if I did not agree to their terms. He said I would be dealt square with and that was all that was said. This
640 was before Fagan and Merritt came up together, about a week before to the best of my knowledge.

Defendant moves to strike out all the evidence relative to the conversation between Fagan & Power on the ground that Mr. Fagan had no authority to represent Eaton or Mrs. Stram. When Fagan & Merritt came there together, they looked over the land. Stopped over night, and started for Duluth on Sunday morning.

641 ———

April 10, 1886.

Re-direct examination of James Power continued.

I knew Fagan before this. I understood him to be in the employ of Eaton & Merritt. I had heard that from Lon Merritt. Mr. Merritt said in my presence that Fagan must be a pretty good
642 man as he (Merritt) paid him such and such a salary by the year. When Mr. Fagan came there a week before he and Merritt came together he said he was sent there by Eaton & Merritt. I was not on the land when Fagan was there the first time. I met him coming away as I was going on the land from my trip to Vermillion. I was not away over three days. About a week later Fagan and Merritt came on the land together. While Byrne and I were on the land making improve-

ments Mr. Lonstorf, Mr. Harvey, Mr. Parrault, Mr. Hartmann and others whose names I do not know were on the land, and at the time they were there the marks were on the shanty and plain to be seen.

643

RE-CROSS.

At the time Fagan & Merritt came up there Mr. Byrne, Mr. Clement and I and I think one Indian packer were there.

Q. Did you sit down at the door of the shanty with these parties and talk until late at night? A. I had no time piece and don't know how late it was, but we sat there talking.

644 Q. Did you not talk over just what the object was in being there and the whole arrangement? A. No sir, not to my knowledge.

Q. Was that not on Saturday, June 23, 1883? A. It was on Saturday, but I don't remember the date.

Q. Was not the interest that Mr. Byrne was to have for making the improvements talked over at that time? A. Not in my presence.

645 Q. Was not the interest also that you were to receive from Mr. Byrne for assisting him also talked over at that sitting? A. Not in that light.

Q. Did you not state at that sitting that that was just as you understood it before you went up there and that you were satisfied or words to that effect? A. No sir. I never slept in the shanty over night—that I put up there.

Q. Did you not sleep in the shanty that you claim was put up by Byrne for a homestead? A.

Yes, I did sleep in that shanty. We had a tent pitched within the walls of the shanty. The tent was never pitched on my land.

Q. Did you ever pay Byrne anything for the minutes of your alleged claim? A. I never paid him anything or never promised to pay him any-
646 thing. I never was asked anything for the minutes. I have received money from Byrnes. I never paid Byrnes anything for supplies nor promised to. I never was asked to pay him for them. I refunded the money I got from Byrne before going up there. I knew when I went up there that I had filed a pre-emption but was not positive of it.

Q. How long after you came down here and received your deed of your 1-3 interest with Byrne and Clement was it before you discovered that the
647 affidavit you signed in Haines' office was false? A. I never knew that I made an affidavit in Mr. Haines' office until I saw it in this trial.

Q. Did you not see a copy of it while you were in jail? A. I did.

Q. Do you now still insist that the contents of the affidavit made by you, Byrne and Clement in Haines' office were false? A. I do.

Q. Did Clement help build your shanty? A.
648 Yes, sir.

Q. Did you ever pay or promise to pay him anything for his help? A. Yes sir.

Q. How much and when? A. There was no stipulation made. I was to give him an interest in the land. Clement and I had an understanding that whatever I got out of the land I was to give him half of. We understood I was to make a homestead.

Q. Was this understood before you made them improvements? A. It was understood in the act of making the improvements.

Q. Did you have an understanding with Byrne to give him something also? A. I did not.

Q. He helped you did he not? A. Yes. 649

Q. Why did you not give him something also? A. He had a homestead himself and I helped him

Q. Why did not Clement also take one? A. I ain't prepared to say. I don't know where Clement is now.

650

RE-DIRECT.

When we were talking that Saturday night by the shanty as I have before spoken of there was nothing said in my presence about the interest I was to get for helping make the improvements, but Byrne took me one side and told me we would get a one-third interest in the land if we would relinquish, or words to that effect. I made 651 no response to that that I remember of. And left the land the next morning. I really believe it was Sunday morning that Byrne told me this and we started for Duluth the same morning. After that talk I done no more improvements on the land that year. (Witness here shown Exhibit "B" and states that he did not fill in the body of it. That it was blank when he signed his name to it.

RE-CROSS.

I don't remember whether Dick Fagan was present when I signed the paper. I am positive it was blank when I signed it. The morning that Byrne called me one side was just before we left the land to come to Duluth and told me we would
652 get 1-3 interest in the land was the first time I ever heard that I was to get a specified interest therein.

Q. You wish then to be understood that you were with these parties all the night before, had made your arrangements to leave and come to Duluth, without knowing what your interest was to be until just as you were starting away? A. I had made no arrangements to leave the land.

653 Q. When did you make arrangements to leave the land? A. I never made any arrangements to leave the land. The rest went away and I had to go or stay there and starve. If I were speaking of actual labor I would say that it did not take me more than a day to build the shanty on my land. A day to roof it and a day to cut a hole for a door. Three days altogether. That is, it could be done in that time, although I was three weeks at it, because I was not at it steady and
654 some days did not work at it at all. Mr. Clement helped me at times, for which I agreed to give him one-half of what I got out of the land. It was a mutual understanding between Byrne, Clement and myself that we were to have an equal interest in the proceeds of what we would receive from the land, we had that understanding before we left town to go up there on the land and also talked it over several times after we got up there. Clement was a witness to both our notices on the

land. When we came from the land to Duluth to make out the papers I had been drinking before we got to town. I took drinks at the junction (Northern Pacific Junction about 27 miles from Duluth) and we came from there on the train. At the junction I drank with Jos. Clement and another party whose name I did not know. I remember of taking three drinks there. The friend of mine whose name I do not remember paid for the drinks. 655

This testimony was carefully read over to the witness after which he subscribed his name thereto.

JAMES H. POWER.

After reading the testimony to witness he was duly sworn this 10th day of April, 1886, before me. 656

R. N. MARBLE,
Register.

April 12th, 1886.

Thomas W. Hyde being duly sworn in his own behalf, as contestant, says: 657

I am one of the contestants on what is known as scrip 19 E. Have been on the land since 20 August, 1884, except at brief intervals when I went there I found a shanty 12x14 feet, half roofed with tamarack and birch bark. It was not mossed and no door hung and no glass in the window, although there was a hole cut for a window. It was not nor never had been inhabitable in my opinion. There was a small clearing on

it, also. There were marks on the shanty. Byrnes came as a homestead was there. The names of Jas. Power, Harvey & Perrault, and Hartmann was also on it. There was also other writing which I could not make out. This was written in pencil, all of it. This shanty is 40 or 50 feet from where
658 I made my improvements. I have built a house. Mossed it, put a floor, door and window in it and cleared two acres of land and put a scoop roof on the shanty. These imprvements are on the N. E. 4 of S. W. 4 of Section 30. There is about 1-4 acre clearing on the S. E. 1-4 of N. W. 1-4 of same section by me.

659

CROSS-EXAMINATION.

Q. Who first suggested to you about going on that land? A. I had a talk with James H. Power. I was around Duluth here when I had the talk. This was a couple of weeks I suppose before I went up there. I could'nt just say whether he spoke first or whether I did. I had not talked with Mr. White before I had with Mr. Power.

Q. Did you suggest to Power to go up to
660 White's office and make affidavit, Exhibit "D."? A. I had a talk with him. About it and he claimed he could make the affidavit.

A. I did not make any arrangement with him to give him interest in the land at any date.

A. He was not to have any interest.

A. Powers put me on the land.

A. I paid him nothing for putting me on the land.

A. I did not agree to allow him anything at that time but agreed to allow him for what time he lost in case we succeeded in getting the land.

A. McDonald and I paid his fare down on the boat and up on the train.

Q. Then when he testified that he borrowed the money ($20) and gave his note for it to pay his 661
expenses down there he testified to an untruth did he? A. We paid his fare on the boat and on the train, but what his outside expenses were I know nothing about. I know nothing about his borrowing the money, or giving the note.

Q. Did you have any contract with Mr. White in writing or otherwise, by which he was to receive any compensation or interest in the land? A. Yes, there was a contract. 662

Q. Where is it? A. I don't know.

Q. When and where did you last see it? A. I have not seen it since it was last drawn up by Mr. White.

Q. What did it contain? A. It contained that when I proved up on the land I was to secure him a one-half interest.

Q. Who witnessed the contract? A. Powers, McDonald and myself and Mr. White were 663
there together, that is all I recollect. I can't say whether Power witnessed it or not.

A. The last I knew of the contract Mr. White had it.

A. Mr. Power was not included in the contract with McDonald, Hyde (myself) and White.

A. I did not find as much as a quarter of an acre cleared on the land when I went there

A. I found a shanty which did not have the appearance of having been lived in. It had no fire place or stove.

A. I directed myself to make the improvements, which I made. I was to get money from Mr. White when I needed it to pay my expenses.

664 THOMAS W. HYDE.

Subscribed and sworn to before me this 12th day of April, 1886.

R. N. MARBLE,
Register.

Angus McDonald, being duly sworn on his own
665 behalf, says:

I reside in Lake County, Minn., Sec. 30, T. 63, R. 11 W. I have lived there since August, 1884. Before that I resided in Duluth, Minn. I am on what land Powers says he made improvements on. When I went there I found a house 12x14 feet 1 1-2 stories high, covered with bark, with a door in it, floor, no windows, there was a bunk in it. There was a little clearing about one hundred feet square. There was marks upon the house.
666 It has Powers' name on and said it was a homestead. I remember only one other name and that was Harvey. I have gone on since and made a clearing and built a house on it. I live in the house I built myself. I have also been over on the other claim where Hyde is. When I went there I found a shanty same size as that found on the claim I am on. It was partly covered with bark. The door was made but not hung. There was a hole cut for a window but no window. There

were also marks on this shanty. I saw the name of Edward Byrne on it. I found stakes around. (Witness here shown a stake and identified it as one he saw cut, and stated that it was on the range line between R. 11 and 12, and sections 13 and 25.) (This was the same stake shown Power.)

667

Attorney for plaintiff here offered stake in evidence. Attorney for defendant objects to it as being incompetent for any purpose, and also that there is nothing in evidence to show that defendant ever used the stake or marked it.

EXAMINATION CONTINUED.

This stake was found on the west line of Hyde's claim. I saw three or four other stakes around the claim, but did not notice whether they were marked or not.

668

Witness here shown Exhibit "B" (a declaratory statement purporting to be witnessed by him) and when asked if he signed the name McDonaid which appears as a witness states that he never signed it.

669

CROSS EXAMINATION.

I first learned of this claim in August, 1884. Jas H. Power first informed me of it. He was the party I first talked with about it. He wanted me to go with him to White & Bowers' office. I had been around town with him before that. He spoke about this claim first. He put me on the claim. Mr. White (White & Bower) has furnished the supplies to keep me on this claim. I am

making the improvements for myself. I don't know of any one being interested in this claim except myself. Judge White has no interest in it. There is an understanding that he is to have an interest in it if we succeed in this trial. He is to have a 1-2 interest. I know R. D. Mallett. He has
670 no interest in the claim. He is not going to have any. The arrangement with Hyde is same as mine. White is to have half if we succeed in this. James H. Power is also to have an interest in it if we succeed. I don't know how much he is to get. I agreed to give him an interest if we succeeded in getting the land. Mr. Hyde went after Power to come and testify in this case. I never had any talk with Mallett about the claim. Mr. White is paying the expenses of the claim with the under-
671 standing that he is to have 1-2 of it after we secure it. The expense so far has been about $300. I have given Mr. White notes for amounts advanced. I give him the notes so that if I don't get the land I would have to pay them. He has also furnished me money to go up and down with to the land and back. He pays me when I ask for it. I am not hired by the month. I had not talked with anybody besides Power.

672

RE-DIRECT.

Q. This half interest you speak of that Mr. White is to have was it to be a deed of, or a security upon a half of the land for advances and services? A. It was a security.

Q. This interest you have spoken of as to Mr. Power and which you say you cannot fix

the amount it, why was that, was it not simply that he was to be paid for his time and services and there was no telling how much time he would have to put in it? A. He was to be paid for his time. That is all I mean by an interest he was to have.

673

CROSS EXAMINED.

I am to let him have an interest in the land when I get it to pay him for his time and services. The contract I have with Mr. White for his 1-2 is in writing.

Q. When you get this land is it not the understanding between you and Mr. White that you 674
are to deed to him an undivided one-half interest in it? A. No, sir, we never mentioned a deed.

Q. What did you mean then by saying that White is to have 1-2 interest? A. To secure him for advances.

Q. Then if it was to secure advances made how can you give him a half interest unless you deed him one-half? A. I could not very well.

Q. Then of course your understanding is that 675
you are to deed him one-half, isn't it?

Question objected to on the ground that it is argumentative. That the witness has already said and explained that he is to give security upon one-half and that he is not to deed one-half; and that not being a lawyer he is not expected to explain to a lawyer the distinction between a security and a conveyance.

A. No. That is not my understanding.

Q. Really you do not know anything about it, do you? A. I know my own transaction about it, but I don't know White's.

Defendant now asks that plaintiff's attorney Mr. White, produce the contract which witness says he has signed. Mr. White states that he has
676 looked in vain for it lately and if he can find it he will produce it.

Q. Did you not understand at the time you went up on White's office with Power, from what he, Power, told you, that he had been talking with White about it before that. A. Yes.

Q. Was it not a part of the services Power was to render that he was to come here and testify in this case. A. No.

Q. Was it not the understanding that he was
677 to put you on the land and help you by testifying in this case? A. If he was called for. Yes.

ANGUS McDONALD.

Sworn and subscribed to before me this 10th day of April, 1886.

R. N. MARBLE,
Register.

---

678 George R. Stuntz, sworn for plaintiff, says:

I am county surveyor of St. Louis Co. I have here the record of the survey of Section 30, T. 63, R. 11 W. It was made by my deputy, Mr. McPherson, but was not made for the government. It was made by the request of parties interested. It was made Oct. 17, 1885.

Defendant offers objection to the evidence because it appears that the survey was made sub-

sequent to the making of the improvement on the land. Also for the further reason that this survey or a government survey does not effect a location made in good faith by Sioux half-breed scrip and located by metes and bounds before the survey and where no settlement is required by the scripee. 679

EXAMINATION CONTINUED.

Inside lines of a section are not made by the government. My deputy is a competent surveyor. The two buildings now on the sketch are according to my survey, and are on N. E. 1-4 of S. W. 1-4 of Sec. 30. Copy of the plat of survey offered in evidence.

(Objected to as incompetent.) 680

The sketch of survey offered in evidence by plaintiff objected to because the surveyor claims to have surveyed out Sec. 30, whereas from his report it appears that he had run only the center line which is not an east and west line, but according to the record is run at an angle of S. 86 degrees 17 minutes W.

It is understood that defendant shall call Mr. Stuntz for cross examination hereafter before the close of the case if desired. 681

GEORGE R. STUNTZ.

Subscribed and sworn to before me this 10th day of April, 1886.

R. N. MARBLE,
Register.

Jewett McPherson, sworn, says:

I reside in Duluth, Minnesota. I am deputy surveyor. I made a survey of one mile of line and a fraction over of Sec. 30, T. 63, R. 11. Exhibit "E." represents the work I did. I established a quarter line east and west through the section.

682 (Testimony of witness objected to for the same reason as that of Mr. Stuntz.)

I found the two houses shown on this plat. I could not say what subdivision of the section they are on. They are south of the center line of the section east and west line through, and west of the center line north and south through the section. They are situated as shown by the records kept in the county record book of the county surveyor. Which I have read over and sworn
683 to once and know is correct. I was appointed and sworn as deputy surveyor, took a government survey chain, and got Angus McDonald and another man to go with me. I had them sworn, and we made the survey. As a result I am satisfied we made the survey correct.

684

CROSS EXAMINED.

Mr. McDonald was the first man that spoke to me about the survey. Mr. White guaranteed my pay. The government establishes the corner and quarter section posts of a survey.

Q. In making that survey did you discover any error made by the government survey of the section in the establishing of corners or quarters?

(Objected to on the ground that the original government *surveys whether right or wrong are* those by which all subsequent conveyances are governed and controlled.

A. I did. I went to the west side of the section, to the quarter post. I had the U. S. record to see if that post and bearings were correct and found they were. I then set up my solar and found my latitude, thence ran east through the center of the section as I supposed. At 93 chains and 26 links I intersected the east line of the section. I intersected 6 chains and 20 links south of the 1-4 post on the east side as shown by the U. S. survey. I then went to the quarter post and ran south 86 degrees 17 minutes W., proved that the line I had run from east to west was a direct east and west line. I found the 1-4 post on the east line 24 rods and 8-10 north of where I expected to find it. I ran a due east line. I found the 1-4 post on the west side correct, but the 1-4 post on the east was 6 chains and 20 links north of where it ought to be. If the line had been carried correct it would have brought the improvements south of the line some 50 or 100 links. 685 686

J. McPHERSON.

Subscribed and sworn to before me this 10th day of April, 1886. 687

R. N. MARBLE,
Register.

Emil Hartmann being duly sworn on the part of contestant, testifies as follows:

I reside here in Duluth. I am a civil engineer and land explorer. I have been on Sec. 30, T. 63,

R. 11 W. I was there in May and June, 1883, in June 1883 I saw Power, Byrne *and Clement* on that section. They were building shanties. There was a log on Byrne's shanty which served as a sort of hotel register and every one that came there signed his name on it. There was also written on it "Homestead entry of Edward Byrne.
688 Settlement made in May sometime, and the lines of the claim drawn. Byrne was there and he explained it to me. He only just showed me which 40s he had taken, as was shown by the lines on the log. I was there also in 1884 and 1885, I saw these same marks after Byrne had left there. I was there twice after Hyde went there. I think there were no marks there then on Byrne's shanty. The marks on Byrne's shanty were made with a
689 pencil.

CROSS EXAMINATION.

When I went there in June, 1883, I had a talk with Byrne relative to his object in being there. He did not tell me Eaton & Merritt was going to scrip the land, I thought Lornstorf was going to scrip it. I told Byrne I had come up there and that I wanted to scrip the land. On Satur-
690 day morning before Lon Merritt came there Byrne said if some one don't come by this evening we will deal with you. I made no memorandum of anything on the building and did not sign my name on it. I would not pretend to say that I could tell every word that was written on the shanty without a memorandum.

RE-DIRECT.

The word homestead was on the poles or stakes and also on the shanty and if it was not understood that Byrne claimed it as a homestead some one else would have had a homestead on it.

EMIL HARTMANN.

691 Subscribed and sworn to before me this 10th day of April, 1886.

April 14, 1886.

S. F. White, being sworn, deposes and says:

692 I am one of the attorneys for the contestants. I have made careful search through my safe and among all for the contract of security given to me by the contestants in these cases to secure me for advances and legal services and am unable to find it. I supposed until about two or three days before the day set for the hearing that it was in the files of the cause at my office, but looked through that and could not find it and then made a careful search through my safe and among all papers where I thought it could be and have continued 693 that search at various times since up to this morning when I made a final last search through my safe and am unable to find it and have no idea where it is.

SHUABEL F. WHITE.

Subscribed and sworn to before me this 14th day of April, 1886.

R. N. MARBLE,
Register.

TESTIMONY ON THE PART OF THE DEFENSE.

Frank W. Eaton, duly sworn, says:

I am one of the parties defendant in this case. I know the description and location of the land in
694 contest. I had something to do with the improvements on said land. I was the duly appointed attorney in fact for Orillie Moreau—Stram—and authorized the making of the improvements for the purpose of locating the scrip in question under the rules of the Land Department. (Witness here shown the files in S. H. B. scrip, 19 D., and identified the scrip certificate and power to locate as the authority under which he proceeded in having the improvements made upon the land prepar-
695 atory to locating the same.) Also identified his own affidavit of the fact of the improvements having been made. Files offered in evidence and marked Exhibit "F" and filed. Witness then shown the files in scrip No. 19 E., and made a like identification. Files offered in evidence marked Exhibit "G" and filed. In having these improvements made upon the land in question I had no other purpose in view but the location of scrip by virtue of the power of attorney. I made the im-
696 provements in good faith solely in pursuance of the powers of attorney for the purpose of securing the location of the scrip in proper form and manner. At the time I caused the improvements to be made the land was unsurveyed and I had no knowledge of it except that it was vacant, unoccupied and unclaimed land by any other persons. I employed Edward Byrne to go and make the improvements upon the land in the first and I subsequently employed Richard Fagan al-

so to go up there. I agreed with Edward Byrne that in consideration of the land proving valuable as he represented to me and in consideration of his erecting or causing to be erected for me valuable improvements on two locations of 160 acres each, that I would pay his expenses necessarily incurred in doing 697
the work, that I would locate the scrip upon the land and as soon thereafter as the location was completed I would cause to be conveyed to him an undivided one-third interest in the land.

To the best of my knowledge Mr. Byrne fulfilled his part of the agreement. I also fulfilled mine. At the time I made the contract with Byrne I knew nothing about James Power or Joseph Clement. I don't think Thomas Ross did anything. I am informed that he went upon the land but 698
do not know what he did. I was present when Byrne, Powers and Clement returned from the land and saw them at the office of Chas. R. Haines (Mendenhall & Haines). Witness here shown Exhibit "C" and identified it. I was present when that affidavit was made. It was read over to Mr. Power. The subject matter of it was talked over with him and the whole affidavit was dictated by me in Mr. Powers presence. It was made after the deed was executed conveying Byrne, 699
Power and Clement 1-3 interest in the land. The circumstances under which the affidavit was made and dictated are as follows: I did not know at that time how much proof was necessary to establish the fact that I had caused improvements to be made on the land, and I thought it necessary that Byrne, Power and Clement should furnish additional proof and for that reason I had this affidavit executed by them to furnish the de-

partment in case more evidence was required. At the time this affidavit was made Mr. Power was sober, and fully understood the contents of it. It was read over to him and explained to him thoroughly. I have papers from Mrs. Stram confirming all my acts as her attorney and also the
700 acts of Leonidas Merritt.

Witness here produced the papers alluded to. Offered in evidence by defendant. Marked Exhibit H. and filed.

Edward Byrne was the explorer who first discovered the lands, and he came to me and told me of them.

701

CROSS EXAMINATION.

I was never on those lands. I first saw Orillie Stram March 31st, 1886. I first saw the scrip papers in Duluth, Minn., some time in the last of May or first of June, 1883, soon after the powers were executed. They were sent here to me and I never had seen them before, I think they were sent by mail. I got them from Byron M. Smith,
702 Minneapolis, Minn.

Q. Then you located these pieces of scrip for the purpose through them of obtaining title to the lands they should cover yourself? A. My intention was to have an interest in it. I did not expect to have the whole.

Q. Who else did you expect to have an interest. A. Mr. Merritt, Mr. Fagan and Mr. Byrne that is all.

Q. You did not expect Mrs. Stram to have any interest in it then? A. No, I did not expect her to have any interest in the land, although she might.

Q. You considered then did you not, that by purchasing the scrip you would obtain all the title to the lands to be located under it, and the scripee named in the scrip, would have no interest in the land and you made the arrangements for the improvements under that supposition did you not? 703

Objected together with all this evidence relative to title for the reason that the scrip patent is issued to the scripee. That Frank W. Eaton was only empowered to locate the same and that by the location of the scrip the title became vested in the scripee and it is wholly immaterial what Mr. Eaton may have expected with regard to the purchase of the land as that was a subsequent consideration and no title could pass in any event without the execution of a deed by Orillie Stram or her duly authorized attorney in fact. 704

Defendant also moves to strike out all the testimony as to what Eaton's intentions were as to what interest he and others expected to get in the property. 705

Question by the Register:

Q. Did you not know at this time that Mr. Merritt was empowered by letters of attorney to sell and convey the land and were you not acting with him jointly in the premises? A. Yes. Mr. Merritt was empowered by letters of attorney to time.

Answer to question previous to last:

A. I made the improvements under the supposition that when he conveyed to me her scrip and power of attorney to locate the same for a valuable consideration and the further contract on her part for a valuable consideration to fully confirm all my acts and also the acts of Leonidas
706 Merritt, her attorney in fact, for the purpose of conveying the lands located under and by virtue of said half-breed scrip that all her rights to any land as far as she was concerned was thereby transferred.

Q. Transferred to whom? A. To whoever her attorney in fact might desire.

Q. You had all these papers that you mentioned in next to your last answer, and Eaton & Merritt had paid the full consideration therefor
707 before the 16th day of June, 1883? A. No sir.

Q. What of those papers did you not have? A. We had the power to locate and convey prior to that time, but we had not fully paid for them.

Q. Who did pay you? A. I made the first payment to Byron M. Smith, and paid the balance to Orillie Stram March 14, 1886. I made no payment to her until then. I had agreed to pay her previous to that time. I made the agreement at
708 the time the powers were obtained by Byron M. Smith.

Q. Did you know at the time this land was conveyed by Merritt (Mrs. Stram's attorney) that Smith had made any such arrangement on her behalf? A. I have already answered the question in answer to the last question before this.

Q. Did you make that arrangement yourself with Mrs. Stram at the time the powers of attorney

were given or did somebody else act for you in making that arrangement.

(Objected to as immaterial.)

A. Byron M. Smith was acting for me supposing that he had full authority. He acted for me and for her. He held her scrip and got new powers of attorney and made the arrangement. I 709
knew of this arrangement at the time we procured the scrip.

Q. That is then, your arrangement was with Smith that you should pay him a certain sum which you did pay for the scrip and a certain other sum which you paid finally March 31, 1886, to Orillie Stram.

(Objected to as incompetent.)

A. Yes. 710

Q. When was you to pay that sum to Mrs. Stram under the original arrangement? A. After the location was perfected and the scrip adjusted.

Q. Were names filled in those powers of attorney when you received them or did you fill them in after you received them?

(Objected to as immaterial.)

A. They were filled in after I received them.

Q. Was the amount to be paid to Mrs. Stram 711
under your arrangement with Smith dependent in any manner upon the value of the land obtained or was it a fixed amount?

Objected to as immaterial.

A. There was a fixed amount between Mr. Smith and myself.

Q. Was Mrs. Stram ever on the land or not, to your knowledge?

Objected to as incompetent.

A. I don't know anything about it.

Q. Mr. Eaton will you explain why you made oath in this affidavit that has been offered here that you had as attorney build upon each of said pieces of land a dwelling house 14x16 feet, 1-story
712 high, built of timber and covered with split shingles with door and windows and had cleared ready for cultivation 1-2 acre of said land and that said improvements were made under the personal direction of said Orillie Stram, and for her personal use and benefit when according to your own testimony you never had seen Orillie Stram and never had been on those lands? A. Because it was true to the best of my information.

713 Q. You did not make these affidavits on information and belief did you? A. Only that portion relative to the improvements on information and belief. As to the other I was acting as the authorized attorney of Stram under a power of attorney and my acts were her acts, and you cannot separate the attorney and principal. And the improvements were made by Byrne and Mr. Fagan directly in my employ and the improvements were such as Mr. Fagan reported to me which state-
714 ment of his I then believed to be true. I had only such knowledge in relation to improvements as I have stated. The men came down from the woods the same day as the deeds to Byrne, Clement and Power were executed.

Q. That is July 2, 1883, if the date on the deed is correct? A. Yes.

Q. How long would it take parties to come down? A. From 3 days to two weeks, according

to weather and other circumstances. I don't know how long it took them.

Q. Had Fagan been to those lands for you more than once before they all came down? A. That was his second trip when they all came down.

Q. Did you have this scrip when you first made arrangements with Byrne to scrip the lands? 715
A. I did not have the scrip at that time.

Q. At what time did you make the arrangement with Byrne? A. Some time the last of May, 1883, we first talked it over. I made a definite arrangement as far as he was concerned at that time. He went up to the lands the next day I think.

Q. Both the powers, to you and Merritt were received by you in blank, were they? A. They 716
were.

RE-DIRECT.

Q. Was Power sworn to the affidavit, Exhibit "C," in your presence. A. Yes, he was DULY SWORN. The power to locate was filled out by Luther Mendenhall, and in the power to 717
convey Mr. Merritt's name was filled in by Byron M. Smith, a few days after I received it.

CROSS EXAMINED.

Power was sworn with his hand uplifted simultaneously with Byrne and Clement. I know this

by seeing him in the act. Power was in the office all the time during the time the affidavit was being prepared.

Question by Register:

Q. How long a time were you all in Mendenhall & Haines' office that day? A. I should say
718 about two hours.

FRANK W. EATON.

Subscribed and sworn to this 14th day of April, 1886.

R. N. MARBLE,
Register.

---

719 April 15th, 1886.

Edward Byrne, being duly sworn, says, I am forty years of age and reside in Duluth, Minn. Have lived there about 6 1-2 years. I am an explorer. I know the property that is in controversy in this case. I discovered the property myself. I know Frank W. Eaton of Duluth, Minn. Have known him about 6 years. I made improvements upon the land in dispute. I built one house 14x16 feet, with a floor and roof, door and window, bunk
720 and table, and another house similar in size to the first house built nearly the same as the first except that it had no window, although a space was cut out for one. I also cleared 1-2 an acre of land. I heard the testimony of Hyde and McDonald. They were mistaken as to there being but half a roof on the shanty, at least as they stood when I left them after building them. There might, however, have been a half roof when they went there a year or so after they were built. The house

as I left it WAS inhabitable. Considering the time of year there was no stove in it and none was required, that is there was no fireplace or chimney as none was required at that time a year. Heating in that part of the country is done with fireplaces. There WAS a door hung in the doorway of the shanty with leather straps when I left. 721
Doors and windows of shanties are commonly stolen in that country by settlers to use on their own shanties when they find owners of property absent. I made those improvements under the direction and instruction of Frank W. Eaton. I made no improvements there in my own behalf. I did not nor did anyone with me make any improvements for the purpose of claiming the land ourselves under the homestead or pre-emption law. 722

Q. Power says that you and he put homestead notices on the buildings. If you did so you may explain why it was done and what was the object? A. We went up to hold this land and make good improvements according to Mr. Eaton's directions, and had to put notices at different places on the land in order to prevent other explorers from squatting or making improvements on the land. Mr. Power understood this and why it was done just as well as I did. Mr. Power was 723
in my employ at the time. I remember of writing of the shanty "improvements" but do not remember of writing "Homestead" because we never intended to take a homestead.

Witness here shown the stake which was introduced in evidence by the plaintiff and testifies that he does not recognize any of his own writing thereon.

I don't know whether that stake came from the land or not. I do not recognize the writing on the stake as my own. I had the arrangement with Mr. Eaton before the improvements were made. The arrangement was made in Eaton's office in Duluth before we went up to the land.
724 The understanding was that I should receive a 1-3 interest in the land $50 in cash, all provisions and tools necessary to make complete the improvements. Mr. Eaton furnished the money as agreed, also tools and provisions after making the arrangements with Eaton I made one with James H. Powers I had intended to employ Warren Miller of Ontonogon, Mich., and make the contract with him but he could not be got at the time and so I took James H. Powers. I made the arrangement
725 in Welch's saloon with Power before we left Duluth to go to the land. I told him I was promised a 1-3 interest in these lands from Eaton for going to make the improvements, and to get that 1-3 interest we would have to go on the land, stay sometime and make improvements and when everything was settled I would divide the one-third with him and Clement, who was my partner when we made the discovery that the land was valuable. He agreed to the arrangement and went
726 with me and assisted in making the improvements under that agreement. I furnished him $20 to buy his outfit with to go there. Before starting I took him to Eaton & Merritt's office and introduced him to Leonidas Merritt. We inquired for Mr. Eaton but could not find him. I was present when Power talked to Mr. Merritt, Mr. Eaton's partner.

Q. Did he not state to Mr. Merritt in your presence that he understood from you that you

were to receive 1-3 interest in the land and that you had agreed to divide that 1-3 with him and Clement.

Objected to as leading and suggesting the answer to witness.

A. He did. Mr. Richard Fagan came up on the land while Power, Clement and I were making 727
the improvements. He came there twice. The first time he came he stated what he came for. He said he came to get the description of the land and to assist in making the improvements. He stated that Mr. F. W. Eaton sent him and he brought a letter from Eaton at the same time. The letter was addressed to me, Edward Byrne. Mr. Fagan worked about two days. It would take one man two days to cut the logs alone for each shanty to build the 728
shanty with, and one man could by no means handle the logs in erecting the shanties. The shanties were from 7 to 9 feet high. When Mr. Fagan came the second time Mr. Merritt came with him and I had no conversation with Fagan. We all left the land and came down to Duluth together. There were Mr. Merritt, Mr. Fagan, Power, Clement and an Indian or two and myself. The Indians were packers, the improvements were all complete when we left there. I did not take 729
Power out one side just before leaving the land and tell him what he was to get. He fully understood the whole matter before we left Duluth, in the first place. The first place we went to after returning to Duluth was Freidenburg's restaurant (called the Parlor saloon) and got our dinner. We then proceeded directly to the office of Mendenhall & Haines; Power, Clement, Merritt, Eaton Fagan and myself went there together, and we all

got our matters fixed up and the papers made out before we left there. I don't know whether Power was there all the time or not. Mr. Power was sober all the time he was there engaged in making out the papers.

Witness here shown Exhibit "C" and said that
730 he recollected Mr. Haines reading an affidavit containing the statement like the one contained in this. I signed this exhibit "C" and identify my signature. The paper I refer to as having been read over by Mr. Haines was made out by him and dictated by Mr. Eaton and was sworn to by Jas. H. Power, Edward Byrne (myself) and Jos. Clement.

Q. Examine Exhibit "C" and state whether the contents of it are true or not? A. They are
731 true. I believe Mr. Power fully understood the import of the exhibit "C" before he signed it. I and the other parties all received our pay from Mr. Eaton according to the agreement made before going up there to make the improvements.

CROSS EXAMINED.

732 Mr. Eaton was never on those lands to my knowledge. Mr. Eaton directed us to go and make good substantial improvements, in the same style as are made by pre-emptors and homesteaders in this country. He did not state specifically how much to clear but gave a general direction. I don't know whether Orillie Stram was on the land or not. I never saw any half-breed woman there. I did not know or had not heard of any such woman at that time. The first time I ever heard

Mrs. Stram's name mentioned was in Haines' office when we made the affidavit. When I made the arrangements with Mr. Eaton I understood that he had the scrip under his control. Either had it in his possession or had made arrangements for it. I had discovered the land about three weeks before going up to make improvements. Clement was with me when I found it. I was then at work for the Minnesota Iron Company. Clement and I were what are called mineral explorers at that time, and had been in the employ of the company eighteen months at that time.

733

734

RE-DIRECT.

I run the biggest part of all the lines about this land. I run the line through the center of the section east and west. I run a true line east from the 1-4 post on the west side of section 30, run it east 1-2 mile. I did it in order to locate the land and find out where to place the improvements. This was before the survey of the interior of the township. I used a "Gurley's Dial Compass." I tested the accuracy of this line by retracing the range line for half a mile between sections 11 and 12. I found the compass correct and that my line was correct east and west, and a right angle line with the range line. The improvements were made north of this east and west line that I ran. They were two hundred paces north of the line. I know something about McPherson who made a subsequent survey. I do not consider him a

735

competent surveyor, or any surveyor at all. I have worked under him on surveys.

Q. What do you know about his making surveys which were inaccurate before?

Objected to as irrevelant and immaterial.

A. I don't recollect any. I consider the sur-
736 vey I made accurate and made the improvement acting under that survey in good faith and believe they are on the land.

RE-CROSS.

The land in question shows signs of iron, and was the reason that I considered it valuable. I
737 will not say positively that I did not write "Homestead" on my shanty, or on the stakes.

Q. Do you say you did not write that on this stake in evidence? A. I cannot swear to anything about that stake.

Q. Now I want an answer distinct to this question "do you swear that you did not write this writing that appears on the stake heretofore introduced in evidence? A. No.

Q. Give me your opinion whether it is your
738 handwriting or not? A. I believe it is my handwriting.

Q. Particularly examine the word "Homestead" and say if that is your writing? A. I can't say, but think it is all my writing.

Q. Why was it not just as easy for you to write the name of the scripee for whom that land was being taken upon those improvements and stakes as to write your own name and Power?

Question by Register.

Q. For what purpose did you put these stakes there with your names? A. To keep other explorers and claimants off under our orders from Eaton and mislead and keep others off the land.

Preceding question objected to as frivolous. Objection sustained on the ground that witness 739
has already testified that at that time he had no knowledge of the name of the scripee and that the words written on the stake were written for the purpose of misleading others who might wish to squat on the land.

Plaintiff's attorney excepts to the ruling on the ground that it is arbitrary and not within the power of Register and Receiver under the rules promulgated by the General Land Office for their 740
government.

Q. You understood at the time you were making these marks that you were making this improvement under Sioux half-breed scrip, did you? A. Yes.

Q. Who did you understand owned this scrip? A. Frank W. Eaton.

Q. Why did you not mark the stakes and improvements on the land with Frank W. Eaton's name? 741

Same objection and same ruling as in the foregoing question.

Same exception by plaintiff's attorney.

Q. You thought then did you, that it would be better to serve your purpose to mark those improvements falsely than truly?

Same objection, ruling and exception.

Answer to question by Register:

I was aware that the lands were valuable four years before the improvements were made, but had not made a careful examination of them until about three weeks before making the arrangements with Mr. Eaton.

Q. Did you mark these lands as you did to
742 mislead any person who might have an interest in the land by settlement or otherwise or did you as being the first party who made the improvements thereon mark them to mislead and keep others off and thus protect the interests of Mr. Eaton who employed you? A. I marked them to protect Mr. Eaton's interests and keep others off as I was the first party to make improvements and I thereafter walked about the lines for days with a revolver to protect Eaton's interests and keep
743 others off.

Q. Was Lonstorf there while you were there? A. Yes. Mr. Hartmann was there also. The latter was there 10 or 12 days before Fagan & Merritt came. It was before Fagan came the first time. I had no talk with Hartmann that I recollect of about selling to him although I will not say that I did not have any such talk. I heard Mr. Hartmann's testimony.

Q. Did you not tell him as he said that if par-
744 ties were not there that day whom you expected you would treat with him for sale or words to that effect? A. I had nothing to sell. I don't remember of telling him so. I don't remember whether I told him so or not. I will not say whether I did or did not tell him so.

A. I can't say how many days I was there before Fagan came the first time but think about 15 days.

A. About the same length of time afterwards we came down.

A. We were about six days coming down.

A. We left here to go up there about the middle of May, 1883.

A. Were about six days going up.

A. We were on the land not quite a month 745
I think.

A. The improvements were not completed when Fagan left there the first time. My shanty was completed but Powers' was not.

A. Powers' was completed afterwards.

A. The door was hung on the inside and it fit as near as they generally fit in the woods.

A. There was a jam to the doorway.

A. The roof part that was covered with 746
shakes was a portion on each end, say a foot or 18 inches.

A. The shanties were chinked but not mossed.

A. I do not know whether Power drank any after he came in town that day at the Friedenburg's restaurant (Parlor saloon) or not.

A. I don't know whether he and Clement went across the street from Mendenhall & Haines' 747
office and got some drinks or not.

A. We were all three sworn to the affidavit in the same way, at the same time and by the same officer.

Q. How was that done? A. As near as I can recollect the affidavit was read over by Mr. Haines who asked if we understood it. We held up our right hands and swore to it and signed our

names. Then he went to the desk and put his stamp on it.

A. I saw Power hold up his right hand. By window I mean a hole cut in between the logs; we had no glass windows.

A. The contents of the letter from Eaton
748 which I spoke of were to the effect that he had been disappointed in getting the description of the claims from the man he had sent up there before, and sent Mr. Fagan up to get another description and assist us with the work. That was the substance of it.

Q. What was your idea in getting Power to go with you to improve this land if you already had Clement as a partner? Why did you and Clement not do it without taking a third man? A.
749 Because Clement had a pre-emption filing in 62, R. 16, at that time, and was well acquainted in the country.

Q. How did that make any difference with his assisting you alone without Power's help in making these improvements on the land that you were improving so that Eaton might get them with Sioux scrip? A. Because the parties that I was suspicious of would take advantage of the knowledge they had of Clement having a
750 pre-emption and go on the land in opposition to him sooner than they would against a man who had no filing.

Q. Did not Power have a pre-emption claim too? A. I was not aware that he had at the time I employed him in Duluth.

Q. Do you pretend to say that the fact that a man had taken a pre-emption claim would thereafter prevent him taking a homestead and that

was the reason why Clement could not go on this land and make improvements with you?

(Objected to for the reason that witness has not testified to anything of the kind included in the question but has explained his very reasons.)

A. I cannot answer the question. 751

RE-DIRECT.

When Fagan left for Duluth the first time the improvements were all completed except hanging the door and cutting a window. After he came there he assisted in completing them up to that point.

A. Speaking of Hartmann and what I told 752
him I will say that many people came there making propositions to me and I had to tell them anything I could devise to get rid of them and get them to leave me alone.

EDWARD BYRNE.

Subscribed and sworn to before me this 15th day of April, 1886.

R. N. MARBLE,
Register.

753

Richard H. Fagan, being duly sworn, says, I am 28 years of age. I make Duluth my home when not at work in the woods. I have been here since the summer of 1882. I am acquainted with Frank W. Eaton. Have known him since the summer of 1882. I know where the land in question

is located I have been on it. I was there twice during 1883. I went there for Frank Eaton and by his direction. I went then there first time to get the minutes of the land and also to help Edward Byrne make improvements. When I was returning I met Mr. Jas. H. Power going to the land
754 from Vermillion with supplies, and had a conversation with him. He told me he was helping Ed. Byrne make improvements on the two locations. He did not say who it was for. I helped Ed. Byrne build a shanty, put up the walls and put on a roof. The roof was made of shingles (split Norway) and cedar bark and birch bark. Ed. Byrne and I put the shingles on. They were put on both ends of the shanty 17 or 18 inches running from the edge of the roof to the top. They were put on
755 to hold the bark together and cover places where the bark did not come together. I saw the same shingles that were on these shanties, after Hyde and McDonald went on to the property. I saw that the shingles which were on Byrne's shanty had been taken off and put down to make a floor at a water hole. I also saw that the shingles which were on the house Powers' built were taken down and used for the same purpose. The improvements on the location were all complete except the hang-
756 ing of a door and cutting of a window hole in one shanty. When I left there to come to Duluth the first time I had a memorandum of the improvements and how they were made which I took to Mr. Eaton when I came down. It was in pencil and made by myself. I have the memorandum yet and can produce it. The original memorandum is torn and cannot be deciphered except by one who wrote it. I have a copy here which I have copied off.

Q. Can you state from your own memory without the aid of the memorandum what improvements you reported to Mr. Eaton? A. I can.

Q. State them?

Question withdrawn.

A. When I left the land to come and report the improvements to Mr. Eaton the following improvements were on the land. Two shanties (one on each location) with good roof, door and window, the window was a hole cut in without any glass, in Byrnes' shanty. And 1-2 an acre cleared on each location. Byrnes' was pretty well cleared off, and Powers' the same. 757

Q. Why do you call one claim Byrnes' and one Powers'? A. I speak of them thus to designate the improvements on each location. I speak all the time of improvements that Byrne made for Eaton and what have been alluded to in the testimony as Byrnes' shanty and Powers' shanty made by them in 1883, to locate the scrip in question. 758

A. I also afterwards went up to the land with Mr. Merritt to get the parties to come down.

A. The matter of the agreement that had been made was all talked over the Saturday evening before we started down on Monday morning.

A. Mr Power was present and took part in the conversation. 759

A. Mr. Merritt, Byrne, Clement and Powers and myself sat by the camp fire and talked the matter over as arranged in Duluth before Byrne and Power went up in the first place. Mr. Merritt, Byrne and Power all talked of the arrangement Eaton and Byrne had made previously in Duluth, they all seemed satisfied with it. The quantity of interest was talked over to the effect

that Byrne was to receive 1-3 interest. He also agreed to give Clement and Power 1-9. This was mentioned as the interest that had been talked and arranged by Byrne and Eaton in Duluth. Powers said that he was satisfied and that he was ready to go to Duluth as quick as we could. Pre-
760 vious to this time I had run that line through the centre east and west through section 30. I run east from quarter post in the west line of section 30. I went to the N. E. section 25-63-12, traced the range line south to the 1-4 post between section 25 and 30, then run east 1-2 mile, found the improvements located north of the line then continued on 1-2 mile farther and found the location of the second improvements north of the line I was running, both improvements were located
761 200 paces north of the line the paces run about 5 1-2 to the rod according to my pacing the line I was running being the center line of the section east and west. This was before the government survey of the interior of T. 63, R. 11 W. I run the line with a pocket compass that I have used in tracing government surveys for years before, and have always found accurate and correct in every point.

Q. Have you been in section 30, T. 63, R. 11
762 W. since the government survey has been made and is the 1-4 post of the west side of section 30, 63, 11 W. the same 1-4 post as was made for the east side of sections 25 and 63, R. 12 W.

A. It was the same the last time I saw it.

Q. And in running east from that quarter post are the improvements on the land which are described by metes and bounds in the location of the scrip? A. They are.

A. I know McPherson, the person who testified to having made a subsequent survey of this line.

A. Have known him since the fall of 1882.

A. I know him to go by the name of a surveyor.

Q. Do you consider him a competent surveyor. 763

Objected to because the witness is not competent.

A. I do not. I traced his work several times and found his section corners an eighth of a mile out of the way. This I know for a fact and can bring witnesses to prove it.

(Objected to as not responsive to the question.)

764

When I came down from the land the second time Merritt, Byrne, Clement and Powers were with me. Powers was sober on the way down. He was dead sober when we started and dead sober when we got here. We came from Northern Pacific Junction to Duluth. When we got here we went to Friendenburg's restaurant (Parlor saloon) direct and got dinner all of us. From there we went to Mendenhall & Haines' office. After we went to that office none of us left there until the papers were all made out except Mr. Eaton, who went out a short time to get some papers. Mr. Powers was entirely sober while in there. 765

Look at this paper, Exhibit "C" and see if you know it? A. I did not look over the paper there but I know that Clement, Byrne and Power signed just such a paper as that. The contents were read over to all three of the parties in my presence. It was also sworn and signed in my

presence. I was familiar with the facts set forth in the paper and knew at that time and how that they are true.

---

766 CROSS EXAMINED.

April 16, 1886.

I am not a civil engineer and surveying is not my occupation. I have studied surveying a little in school but not enough to follow it as my business. I saw these shakes that were put on to the shanties built by Byrne and Power, last June, 1885. I cannot say how many of those that were once on the roof, I saw in June, 1885, I think about
767 2 or three dozen at both locations I have described. In 1883 there was in the neighborhood of 3 or 4 dozen, on each roof of these shanties. I saw from 1-3 to 1-2 of those same shakes at the water holes in 1885. I do not think the tops of the roofs after the shakes had been removed show just where the shakes had been placed.

Q. Are you positive about this testimony as to the shakes you saw there in 1885 as you are
768 about any of the rest of your testimony? A. I am as positive as to these shakes.

A. In the talk had at the camp the Saturday night before we all started for Duluth Powers said that he was glad and pleased to see Lon Merritt on the location. So that Byrne and him could get back to Duluth. He talked two or three hours and said he had been working there with Byrne making the improvements and that they had got them complete.

Q. What else do you remember that he said?
A. He then talked with Lon Merritt and Byrnes and I did not listen to them.

A. I heard Powers speak of his interest in the land that night.

A. He said, is this right Mr. Merritt. When Byrne gets his 1-3 we will get ours with him? 769

A. I do not remember that he said anything else. I heard more conversation on the part of Power after that before we came to Duluth. This was on the land on the following Sunday. We were hanging the door in the shanty built by Byrne. He said we will all be on our way to Duluth in the morning. Power and I hung the door in the shanty.

A. He also said on his way down "Byrne is going to get an interest in this and I am going to get an equal interest with him and can't we arrangs some way to form a stock company with Eaton & Merritt. That is all on that point at that time. 770

A. As we came down the St. Louis River to Knife Falls and Northern Pacific Junction he talked on the same subject and in the same way. At Northern Pacific Junction and Duluth he talked about the same matter. I do not recall his words except that he talked of a stock company. Power never drank but one glass of liquor before going to Mendenhall & Haines' office and that was a glass of beer at the restaurant. He never left the office there until the papers were signed, and drank nothing during the time. The papers were signed about 2 1-2 hours after we came to Duluth. 771

Question by Receiver:

A. Mr Power had no drink before we got to Duluth that day. We came together to Duluth, and went all together to the restaurant, took dinner and then went direct to Mendenhall & Haines' office all together.

Q. Did you keep such watch of him that you
772 know that he did not go out of that office until the papers were signed? A. I kept no more watch of him than I did of the others and I know that no one left the office prior to the signing of the papers except Frank Eaton who went out a moment to get some papers.

A. When I met Power as I was coming from the land the first time he told me he was working for Byrne and that he was then taking in supplies
773 to him. That was all on that subject.

A. The marks were on the improvements when I was there the first time, on the shanty and on the stakes.

A. On the shanty, on the third log from the ground on the left hand as you go in the door was "Edward Byrne's improvements. (Description of land.) (Date of settlement and improvement commenced.) (Settlement continued and date.) Then (Again continued and date.) This was written in
774 pencil. The second time I was there I think Hartmann's and Harvey's names were on the shanty. The word "Homestead" was not written there in that place. It was not any place else that I saw. I have seen the stakes also and Jos. Clement and I wrote on them. I wrote in my own hand writing. I mean by water hole a well they dip up water.

RE-DIRECT.

I am following exploring for a living and have for over five years. I put all my time in looking government land, locating and estimating, in Duluth and St. Cloud district and St. Croix River. I have had experience in running lines and looking up posts. It is part of my business to get cor- 775
rections and look up corners and meander p
A man in my business has to be very particular in getting the proper corrections and all posts and corners in order to make correct locations and a man in my business gains a great deal of knowledge of surveying by this practice.

RE-CROSS. 776

I generally run my lines with a pocket compass when locating land and take my distances by pacing. I find the boundary lines by going to the corner of a section then running east or in any direction I may desire to circumscribe, or to locate any quarter post, and in subdividing a section I go from quarter post to quarter post or from quarter post to corner.

R. H. FAGAN. 777

Subscribed and sworn to before me this 16th day of April, 1886.

R. N. MARBLE,
Register.

James H. Finn, being sworn, says, I reside in Duluth, Minn., (Rice's Point Division). Saloon

keeping was my last occupation. In 1884 and 1885 I was an explorer. I was at the Byrne shanty in August, 1884. I did not stop there at all, just went past. The last time I was there was in December, 1885. I was then also there in July, 1885. I may have been there a dozen times altogether.

778 I did not notice the Byrne and Power shanties particularly. I do not know what the Byrne and Power shanties are of my own knowledge. I have been told. I know where the Hyde and McDonald shanties are. The other two shanties that I have been told were the Byrne and Power shanties were Byrnes about 50 feet from Hydes and Powers, about 100 feet from McDonald's. I never saw any shakes around there at any time.

Question by Register.

779 Q. Do you know of there being any such place as Fagan has testified to as being a water hole? A. I don't. There might have been a dozen there and I not know anything about it.

Q. Was there any shakes at any time you were there laid down as a floor to any well, water hole or watering place near Hyde or McDonald's shanties or either of them apparent to you? A. No sir.

780 ———

CROSS.

Q. Do you know whether there was any shakes there or not? A. I do not. I did not see any There might have been some around there that I did not know anything about.

Defendant moves to strike out the testimony of Fann on the ground that the witness does not

profess to know anything about it, and that it is immaterial and that the whole of that kind of evidence offered by the witness is frivolous and not competent to the issue.

JAMES H. FINN.

Subscribed and sworn to before me this 16th day of April, 1886. 781

R. N. MARBLE,
Register.

Argus McDonald, recalled in rebuttal, says:

Q. State whether or not at any time since you went on to the land you are residing on in August, 1884, there had been any shakes around those 782
premises that were made previous to your going there? A. No sir.

A. If there had been any I certainly should have seen them I think.

A. I have frequently been over to Hyde's place.

A. There were no shakes around there either.

A. If there had been any there I would have seen them as I have worked all around there. 783

A. There was no water hole around there floored with shakes. I had a water hole in my place timbered, but not with shakes.

A. There was no water hole near Hyde's place, but a running creek. My water hole was fixed with timber about 2 inches thick which I cut myself. I could not get water out of this hole except in the fall and spring.

A. I usually get water from the creek. The logs in Powers' shanty are all the way from 8 inches to a foot in diameter, but in the Byrne shanty they were not so large.

A. I never measured the heights of the shanty and do not know. A. A man could cut.
784 the timber (fell the trees and cut it up) for either shanty in half a day.

A. I could put up the Byrne shanty alone, but could not very well put up Power shanty alone as the timber is larger.

CROSS.

785 Q. Is there not a dug well from 25 to 30 paces west of your shanty?

A. There was a hole there but it was not a dug hole.

A. It is a hole that I have got water from in wet seasons. This is the one that I timbered up.

A. It is hardly a foot deep.

A. It is a mud hole.

A. I could not see any rocks about the holes.

A. It is near the foot of an elevation which
786 I could not call a bluff, and I don't know what kind of a bottom it has. The timber in the Byrne shanty is from 5 to 10 inches in diameter.

A. All I know about there not being any shakes on the roofs of the Byrne and Power shanties was that I saw none when I went there in 1884.

Q. Did you ever make an examination of those premises solely for the purpose of ascertaining

whether there was any shakes around there or not? A. I did not.

Q. Did you when you went there have any instructions from anybody to ascertain whether there was any shakes there. A. I did not.

Q. Was there not a good deal of rubbish around there. A. I saw nothing but tamarack 787
bark.

Q. Will you positively swear that there was no shakes when you went there, around either one of those shanties or around the premises? A. There was none around the clearings or around the improvements.

A. Norway pine shakes would make good kindling if they were dry and any woodsman that came around would be glad to get them for kindling if they were dry. 788

RE-DIRECT.

A. There were roots at the water hole.

789

RE-CROSS.

A. I timbered my well with poplar cut in strips a foot and a half long. Two inches thick and about two inches wide.

ANGUS McDONALD.

Subscribed and sworn to before me this 16th day of April, 1886.

R. N. MARBLE,
Register.

REBUTTAL.

Thomas W. Hyde, recalled, says:

I have never seen any shakes on the shanty built by Byrne or around there or around the water hole alluded to by Mr. Fagan. I get my water right south of my shanty out of a running creek.
790 I never had any well or water hole more than I cut through the ice when the creek is frozen. I never used any shakes at all for any floor around that. There could not have been any shakes around my shanty or my creek without my seeing them. The shanties are about 45 or 50 feet apart. All that I saw that could be split around there was what was split for a door and table. I did not see any shakes around the Power shanty either. There was none on the roof which was cov-
791 ered with bark. There was no shakes around there that I could see. I was over there frequently. If there had been any shakes around there I would have seen them. McDonald gets his water out of the same creek as I do only higher up the same.

Q. What sized logs is the Byrne shanty built of?

(Objected to as not rebutting evidence and
792 not material to any evidence in the case.)

A. They will average about 8 to 10 inches, 14 and 16 feet long, red pine, jack pine, Norway and tamarack.

A. The shanty is about 5 feet 10 inches high.

A. A man I should consider could cut the logs inside of a half a day.

A. Two men could handle them easily.

CROSS.

A. I say that the shanty is about 5 feet 10 inches high.

Q. Will you swear positively that in giving your testimony before here, you did not swear that the shanty was about 7 feet high, the log part I mean? A. Not to my knowledge I did not. 793

Q. Will you swear positively that you did not so testify. I want an answer, yes or no? A. I believe I did not say so.

Q. Do you want yourself placed upon record here as testifying under oath ,that a man could fell the trees, cut them the proper lengths, where the trees would average 8 to 10 inches in diameter, according to your testimony for that shanty of Byrnes in less than one-half day? A. Yes sir, 794 I can cut them in less than half a day.

A. What might take one man half a day might take another longer.

Q. Is there not a dug well from 25 to 30 paces west of McDonald's shanty? A. Not to my knowledge. There is hole there between some rocks.

Q. Are you as positive that there is not a dug well in the locality I have spoken of as you are to any testimony you have given since you have 795 attended this case before the Register and Receiver? A. I am.

Q. When did you go there to reside? A. In August, 1884.

A. When I went there part of the roof was gone from the Byrne shanty.

A. I do not know what covered that part of the roof that was gone.

A. I don't know whether it was shingles of bark on that part.

Q. You have no knowledge as to what the roofs of those shanties were covered with when they were built other than what you say when you went there in August, 1884? A. Nothing but
796 what I saw on it when I went there in August, 1884.

A. My shanty is on a hill and about 45 or 50 feet east of the Byrne shanty.

A. I have to go down the bluff about 40 or 50 feet to get water from the creek. It is about 30 paces to the creek but the bluff is about 45 or 50 feet high.

A. I got my water there instead of providing a well.

797 Q. Did you not testify before in this case that there was no table in Byrnes' shanty? A. I did not.

RE-DIRECT.

A. The Byrne shanty is about 7 feet high at the peak.

THOMAS W. HYDE.

798 Subscribed and sworn to before me this 16th day of April, 1886.

R. N. MARBLE,
Register.

Plaintiff's attorney gives notice that he will apply for an order to take testimony by deposi-

tion of Orillie Stram, Jac. Raffauf, Thomas Ross and Jos. Clement all of whom are outside of the State of Minnesota. And rests.

It is stipulated and agreed upon that this testimony shall be considered in determining the validity of both locations of scrip, 19 D. and 19 E.

799

Defendant offers in evidence two powers of attorney from Orillie Stram, formerly Orillie Moreau, and Roman Stram, her husband, of Crawford County, Wisconsin, to Leonidas Merritt, to convey land, one under and by virtue of Sioux or Dakota half-breed scrip No. 19 D., for 160 acres, 800
issued to Orillie Moreau, now Orillie Stram, the other to convey land under and by virtue of the same kind of scrip, No. 19 E.

(Objected to as irrelevant and immaterial as it already appears in evidence that they were not filled up with the name of any attorney at the time of the execution thereof, nor until some time after the scrip and accompanying papers were purchased by and delivered to Frank W. Eaton.)

Marked Exhibits "T" and "J" and received 801
and filed. Defendant also offers in evidence a printed map of T. 63, R. 11 W., 4th P. M., Minn., accompanied by and attached to a profile of McPherson's survey of the center line of section 30, T. 63, R. 11 W., according to McPherson's evidence and copy of the county surveyor's record.

Received marked Exhibit "K." and filed.

Defendant rests.

(Copy of Book J. of Deeds, page 580.)

(Lake County.)

No. 6490. U. S. Land Office, Receiver's Receipt to Frank Hicks, assignee.

Filed for record October 22d, 1897, at 6 o'clock P. M.

802 No. 14396.

RECEIVER'S OFFICE, Duluth, Minn.,
October 20th, 1897.

DUPLICATE.

Received from Frank Hicks, assignee of Stephen Boyd of St. Louis County, Minnesota, the sum of Two Dollars and .02 cents, being in full for the lots 3, 5 and 6 of section No. 30, in township No. 63, N. of range 11 W., 4th P. M., containing
803 one....acres and 61 hundredths at $1.25 per acre.

F. L. RYAN,
Register.

$2.00.

$.... testimony fee received, number of written words..... rate per 100.....cents.

(Written across the face in red ink.)

804 "Excess to additional Homestead Entry No. 10735 under section 2306, R. S."

(Copy of D. of Deeds, page 204.)

(Lake County.)

Excess Rec. receipt, U. S. Land Office, Orillie Stram.

Filed for record December 5th, 1885, at 3 o'clock P. M.

Excess Receiver's Receipt.

No. 7762.

Received of Orillie Stram, the sum of Two Dollars .....cents, being in full for one acre and 61 hundredths, of lots 3, 5 and 6 and S. E. 1-4 of N. 805
W. 1-4 section 30, in township No. 63, N. of range 11 W., being excess in said tract over the acre entered under the Sioux half-breed scrip No. 19 E., R. & R., 188.

E. G. SWANSTROM,
Receiver.

$2.00

806

(Copy of D. of Deeds, page 205.)

(Lake County.)

Warranty Deed, Orilie Stram and husband to Frank W. Eaton.

Filed for record December 5th, 1885, at 3 o'clock P. M.

This indenture made this thirtieth day of October in the year of our Lord one thousand eight hundred and eighty-five, between Orilie Stram (be- 807
fore married Orilie Moreau) and Roman Stram, her husband, by Leonidas Merritt, their attorney in fact, parties of the first part, and Frank W. Eaton of Duluth, Minnesota, party of the second part, witnesseth—

Whereas, on the 13th day of June, A. D. 1883, grantors herein by their attorney in fact, caused to be filed in the U. S. Land Office at Duluth, Minnesota, an application for certain lands and Sioux

half-breed scrip No. 19 D. and No. 19 E. each for 160 acres of land thereby by virtue of the laws of the United States and conditions precedent, which have been complied with, vesting the title to the said lands described in said application by metes and bounds in her, the said Orilie Stram (said
808 description being by metes and bounds for the reason that said land had not yet been surveyed by the government); and whereas, said land has since been surveyed under the direction of the government and a plat thereof filed in the said U. S. Land Office at Duluth, upon which said plat the aforesaid scrip and entry was adjusted July 21, 1885, thereby specifically and properly describing the land filed upon and intended to be entered on June 13th, 1883, in the name of said
809 Orilie Stram, by her attorney in fact,

Now, therefore, in consideration of one dollar and for the purpose of reaffirming, reforming and properly describing certain deeds of conveyance of said land heretofore given, said parties of the first part hereby grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns, forever, all of an undivided seven-ninths part of said interest in and to all of the following pieces, parcels and tracts of land sit-
810 uate in the Counties of Saint Louis and Lake in the State of Minnesota, described as follows, to-wit: Lots one (1), two (2), three (3), five (5) and six (6), the southwest quarter of the northeast quarter, and southeast quarter of the northwest quarter, and he northwest quarter of the southeast quarter, all being in section thirty (3) and in township No. sixty-three (63) north and of range No. eleven (11) west of the fourth (4) principal meridian in Minnesota, containing according to

the United States government survey three hundred thirteen and sixty-one hundredths (313.61) acres more or less.

To have and to hold the same together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining to the said party of the second part, 811
his heirs and assigns, forever. And the said parties of the first part for their heirs, executors and administrators do covenant with the said party of the second part, his heirs and assigns, that they are well seized in fee of the land and premises aforesaid and have good right to sell and convey the said land in manner and form aforesaid; that the same are free and clear from all incumbrances and the above bargained premises in the quiet and peace- 812
able possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof the said parties of the first part will warrant and defend.

In testimony whereof the said parties of the first part have by their attorney in fact hereunto set their hands and seals the day and year first above written.

ORILIE STRAM, (Seal.) 813
By LEONIDAS MERRITT, (Seal.)
Her Attorney in Fact.
ROMAN STRAM, (Seal.)
By LEONIDAS MERRITT, (Seal.)
His Attorney in Fact.

Signed, sealed and delivered in
presence of
R. N. MARBLE,
W. C. JOHNSON.

STATE OF MINNESOTA, COUNTY OF ST. Louis.—ss.

On this thirtieth day of October, A. D. 1885, before me, Ralph W. Marble, notary public, in and for said county, personally came Leonidas Merritt, as the attorney in fact for Orillie Stram and
814 Roman Stram, and acknowledged that he executed the foregoing deed freely and voluntarily as the act and deed of the said Orillie Stram and the said Roman Stram.

RALPH W. MARBLE,
Notary Public,
Saint Louis Co., Minnesota.

(Notarial Seal. St. Louis County, Minn.)

815

I hereby certify that I have examined the foregoing proposed case and that it contains all the evidence, objections, rulings and exceptions and other proceedings had on the trial of the foregoing entitled action, and that on motion of Wal-
816 ter Ayers, attorney for plaintiff, L. C. Harris appearing for the defendants upon the settlement, I have settled and allowed the same as and for the settled case in the above entitled action, viz: The Midway Company versus Frank W. Eaton, et al.

Dated December 28th, 1899.

By the Court,

S. H. MOER,
Judge.

STATE OF MINNESOTA, COUNTY OF ST. Louis, District Court, Eleventh Judicial District.

MIDWAY COMPANY, Plaintiff, 817

vs.

FRANK W. EATON, ET AL., Defendants.

NOTICE OF MOTION.

Please take notice, that on the 28th day of December, A. D. 1899, at the hour of eleven o'clock 818
in the forenoon, or as soon thereafter as counsel can be heard, at the chambers of the Hon. S. H. Moer, at the Court House, in the City of Duluth, a motion will be made that the decision in the above entitled cause be vacated and a new trial granted, for the following causes, to-wit:

1. That the said decision is not justified by the evidence.

2. That the said decision is contrary to law.

3. For errors of law occurring upon the trial 819
and duly excepted to by the plaintiff herein.

Such motion will be made upon all of the files in said cause and upon the case settled and allowed herein.

Yours respectfully,

WALTER AYERS,
Attorney for Plaintiff.

Dated December 28, 1899.

To Messrs. J. L. Washburn, W. D. Bailey, L. C. Harris, Frank Cutting, W. B. Phelps and Phelps & McClintock, attorneys for defendants.

---

820 Due service of within notice by copy admitted this 28th day of December, 1899.

J. L. WASHBURN AND
W. D. BAILEY,
Attorneys for Merritt, Clark and Fagan.
FRANK CUTTING AND
TOWNE & HARRIS,
Attorneys for Eaton.
WM. B. PHELPS AND
PHELPS & McCLINTOCK,
821 Attorneys for Defendant Lonstorf.

STATE OF MINNESOTA, COUNTY OF ST. Louis, District Court, Eleventh Judicial District.

---

822 THE MIDWAY COMPANY, Plaintiff,

vs.

FRANK W. EATON, ET AL., Defendants.

ORDER.

Motion having been made in the above entitled cause, that the decision therein be vacated

and a new trial granted upon the ground that the decision is not justified by the evidence and is contrary to law, and also that errors of law occurred upon the trial of said cause, which were duly excepted to by the plaintiff, said motion being based upon all the files in said cause and the case as settled and allowed therein, now upon 823
due consideration,

It is ordered, that said motion be, and the same hereby is, in all things denied.

By the Court,

S. H. MOER,
Judge.

Dated December 28th, 1899.
Filed December 28th, 1899.

824

STATE OF MINNESOTA, COUNTY OF ST. Louis, District Court, Eleventh Judicial District.

THE MIDWAY COMPANY, Plaintiff,

vs.

FRANK W. EATON, ET AL., Defendants. 825

MEMORANDUM.

I find upon examination of the memorandum heretofore filed by me in this case that it does not

cover all of the points raised in the opinion of the Hon. Secretary of the Interior, and, deeming the issue as made in the pleadings, to be of great importance, I now make and file this memorandum in place of, and as a substitute for, the one originally filed in said cause.

826 Under the Act of July 17th, 1854, one Orillie Moreau received from the United States two certificates, numbered 19 D. and 19 E.

These certificates were commonly known as "Sioux half-breed scrip." Such certificates authorized the party named therein to locate the same upon any of the unoccupied lands of the United States subject to pre-emption or private sale. In case of surveyed lands no act other than the application to locate such scrip was required. In case
827 of unsurveyed lands the act provided that improvements should be made; the kind and character of such improvements to be so made not being specified.

The Act contained the following provision: "No transfer or conveyance of any of said certificates of scrip shall be valid."

The scrip issued under the Act of July 17th, 1854, soon appeared upon the market and was commonly supposed to be available for the purpose
828 of acquiring title to lands of the United States subject to entry thereunder. The method adopted for utilizing such scrip was substantially as follows: The half-breed would give to the purchaser, 1st, a power of attorney to locate the scrip; 2nd, a power of attorney to convey the land to be acquired under such location. In most cases such powers were in blank, the necessary descriptions being filled in at or shortly after the land was located.

The traffic in Sioux half-breed scrip under this system was very large. The scrip being available, as used, for securing title to land, soon became very valuable on the open market. It is probable that of all the scrip issued under the Act three-quarters to four-fifths of it has been handled in exactly the same way as was the particular scrip 829
in the case at bar. The practice being so universal it can safely be assumed that it was well known by the Land Department.

For over thirty years this scrip passed from hand to hand until located by the then holder. During all this time the validity of such location was never, but once, questioned, nor was the question ever raised by the Land Office Department as to its regularity, and it is apparent that the Land Department and the general public's construction 830
of the Act in question was that such transactions were legal and proper. In fact, in the case of Felix vs. Carroll, under date of March 27th, 1865, Judge Otto, as Assistant Secretary of the Interior, held, over-ruling the commissioner, such a location valid. The opinion of the assistant secretary, so far as covers the matter of location, is as follows:

"As to your second objection (that the location of the scrip was invalid) I remark that this kind 831
of scrip is by the law declared to be unassignable. In this case Sophia Felix has signed the application to locate her own scrip. The fact that the scrip was carried to the Land Office and the business transacted by another person does not affect the validity of her interest in the land. As the certificate of location issued in her name and the patent will issue to her, neither the Register's report nor the affidavit of third parties can be ad-

mitted to establish the interest of any other person in the location. We would not recognize such interests if an assignment in writing was produced and duly proved to have been executed by the half-breed.

Whether she would sell, or did sell, the land
832 after the location of her scrip, we need not inquire, and the validity and effect of any such sale or assignment must be left to the arbitrant of the courts of law. The location is valid on its face and the owner of the scrip, so far as she is represented at all, demands the patent to issue in her name, and my decision is that she is entitled thereto."

The Commissioner of the General Land Office had held that the location of the scrip, though made in the name of Felix, was not made by her in
833 person, or by her duly authorized agent for her use and benefit, but by unauthorized persons and for the use and benefit of persons having no legal interest therein.

Out of this case grew the case of Felix vs. Patrick, 145, U. S. Sup. Ct. Rep., page 862, et seq., and upon which the plaintiff relies very largely for a decision in its favor.

The decision of the assistant secretary (Judge Otto) made in 1863, was never called in question,
834 so far as I can learn, until 1886, when the same point was raised in the case at bar and in the case of Allen et al. vs. Merrill et al., before the Secretary of the Interior (Mr. Vilas) and the ruling of the department which had stood for twenty-six years was at that time reversed.

The Commissioner of the General Land Office held the location of the scrip in the case at bar invalid for the reason that the power of attorney

given by the scripee to Eaton, by virtue of which he made the location, did not carry with it under the law, the power and authority to make the improvements which were necessary as a pre-requisite to a valid location of the scrip on unsurveyed land.

The Hon. Secretary of the Interior in his opinion, says: 835

"The scripee never saw the land. At the date of location she had never seen Eaton, who acted as her attorney in fact, and did not then know that there was such a person in existence. She had, as a matter of fact, sold the scrip long prior to the location and had no personal interest in the land, nor were the improvements made for her personal use and benefit. It was a matter of no moment to her where the scrip was located, or 836 whether it was located at all or not. Her actual interest ceased when she disposed of the scrip. It was admitted by her so-called attorneys in fact that she was to have no interest in the land. For a long time she directly and positively repudiated Eaton and Merritt as her attorneys in fact, denying that they acted for her in any capacity whatever. Afterward and but a few days prior to the hearing, she ratified by deed what had been done by them. This ratification, it is evident, was pro- 837 cured at the solicitation of Eaton or Merritt or both, and for a consideration. But such ratification does not change the fact that the improvement and location, though made under the guise of a power of attorney, were made not under the direction and in the interest of the scripee, but for the benefit solely of another, not even known to the scripee, viz: Eaton, who had inserted his name as attorney in the power of attorney executed in

blank. If the location of the scrip was illegal and invalid, then the deed of ratification could not give it validity—could not vitalize that which originally had not in it the germ or essence of legal validity."

The secretary thereupon holds the scrip locations invalid and declares the land in question to be open to disposal under the public land laws of the United States applicable thereto.

From the language quoted the Secretary of the Interior seems to hold the scrip location invalid for two reasons:

1. Because the improvements were not made by her in person or under her direction and in her interest.

2. Because she had violated the provision of the Act of Congress of July, 1854, prohibiting transfers or conveyances of the scrip.

The vital question in this case may then be stated thus: Was the location of the scrip under all the facts and circumstances invalid?

If it was invalid by reason of the fact that the improvements placed upon the land were not so placed thereon under her immediate supervision or direction, then defendants have no standing in court. If it was invalid because under all the facts and circumstances, the transaction amounted to a transfer or conveyance of the scrip in contradiction of law, such invalidity is equally fatal to the success of the defendants.

It was ruled by the Commissioner of the General Land Office and apparently followed by the Secretary of the Interior, that the improvements placed upon the land, not having been made under the immediate direction of the scripee and not be-

ing for her direct benefit, could not be accepted as the improvements required under the Act of Congress and the rule of the department and therefore the location was invalid.

Was such conclusion correct as a matter of law?

841 The Act of Congress of July 17th, 1854, required that improvements should be made upon unsurveyed lands. How such improvements should be made, or in what manner, is not indicated.

The rule of the Land Office required that the Indian should have a direct connection with the land and claim the same for his or her personal use (See circular of May 28th, 1878. 5 C. L. O., 126).

842 It would seem clear that if the rule of the Land Department required anything more to be done by the scripee than did the law itself, that such rule or regulation could be of no force or effect and any rule or regulation of the department which in any way tended to vary or change the law should have been disregarded by the secretary in arriving at his opinion.

843 Under the Act of July 17th, 1854, the half-breed might locate his scrip upon the surveyed lands without showing any improvements whatever. On unsurveyed lands improvements of some kind were required. Why did the Act allow the scripee to locate his scrip on surveyed lands regardless of improvements and require him to show improvements in case of unsurveyed lands. Clearly Congress cared nothing for the improvements themselves and evidently had no thought of making the half-breed a settler on unsurveyed lands.

If this had been the idea, it would have applied with equal force to the surveyed lands as well. As is well known, settlers and occupants of unsurveyed lands acquire certain preferential rights under the land laws of the United States, and it was necessary for Congress having this fact in mind to make some provision whereby persons
844 desiring to settle upon unsurveyed lands, might have NOTICE of the rights of the half-breed. If no improvements of any kind had been required of the half-breed upon unsurveyed lands, all other of our citizens would have been placed in an exceedingly perilous situation, having no means of knowing that there was any claimant to a particular piece of land, settlement might have been made thereon and when the surveys thereof were
845 returned, the application refused for the reason that the same was claimed by location under the scrip issued under the Act of 1854.

This would manifestly have been unjust to the settler. To avoid this Congress provided for improvements upon the unsurveyed lands; this would give notice that some sort of claim was made to a particular tract and in that way deter innocent persons from settling on the same.

If the only object of the requirement for im-
846 provements was to give notice of the claimed right of the half-breed to the land, then it would seem to be immaterial who made the improvements or how they were made. If Eaton in the case at bar, acting under the power of attorney to locate, made the improvements under such power, it was equivalent to the half-breed's doing it herself.

Notice being the primary object of the improvements, those erected by Eaton or his hired

man would be as effectual for the purpose as though the half breed had made them with her own hands.

If improvements were a necessary and essential factor in the location of the scrip, then the power of attorney to locate the scrip necessarily embraced the power to do all things necessary and requisite therein. It would seem to follow that if Orillie Stram could locate the scrip by attorney she could likewise improve by attorney. It is a well settled rule of law that the grant of a power to do a particular thing carries with it the power to do all things necessary and incident to its full execution. 847

The improvements being but an incident to carrying into effect the location of the scrip, Eaton must be held to have acted for the scripee therein. It is admitted by plaintiff that it and its grantor had full and complete notice of all the claimed rights of Orillie Stram, nee Moreau, in and to the land in controversy. 848

That such notice was received long prior to any claim being made by it or its grantors to the premises in question, it therefore becomes in my judgment immaterial as to how or in what manner the improvements were placed upon the land. In fact, there being no intervening rights, I am of the opinion that if no improvements whatever had been made upon the land, such fact, and of itself, would not invalidate the location. The sole object of the improvements was notice. No one being injured by want of the improvements, why should the want of them invalidate the entry? 849

Whether this be so or not, concededly there were improvements in this case placed upon the

land by Eaton. I therefore hold that the scrip location was valid so far as it could have been affected by the provision of law requiring improvements.

2.

850 Was scrip location made by Eaton, as attorney in fact for Orillie Stram, nee Moreau, invalid?

It is argued on the part of the plaintiff that as the power of attorney to Eaton was given for the purpose of locating land in the name of Stram, which was to be thereupon conveyed (under the power of attorney from Stram to Merritt) to Eaton, the transaction was in fact a mere device to avoid
851 the provisions of the Act of Congress prohibiting the transfer or conveyance of such scrip, and therefore the location made under such power to Eaton was invalid.

"No transfer or conveyance of any of such certificates of scrip shall be valid."

It will be observed that alienation of the land acquired by location of the scrip is not prohibited.

That there is a marked distinction between prohibition of alienation of scrip and prohibition
852 of alienation of the land acquired by the location of the scrip, seems clear.

This distinction is recognized in Myers vs. Croft, 20 L. C. P. Co., page 562.

In construing a contract, the Court will always hold in favor of the power of alienation, unless such power is expressly prohibited in language which admits of no doubt. If it be doubtful such a construction will be given as will enable the par-

ties to have the full use and benefit of the property. The power of alienation being one of the highest attributes of ownership, will never be taken away by interpretation or construction. Congress did not in terms prohibit the alienation of the land to be acquired under the scrip location and the courts will not construe a provision prohibiting alienation of scrip to mean land as well. 853

I am of the opinion therefore that the provision cited did not prohibit the alienation of the land to be acquired by location of the scrip. The Act of July 17th, 1854, while in form a law, was in fact a contract with certain half-breed Sioux Indians, whereby and whereunder the half-breed surrendered to the United States government their certain reservation, and, in consideration thereof, the United States agreed to issue to the various 854 members of the tribe certain scrip, such scrip entitling the party named therein to a given amount of land to be by him or her selected from any of the lands belonging to the United States, subject to entry by pre-emption or at private sale—in other words a trade or exchange of lands was effected between the United States and the Sioux half-breed.

The Act of July 17th, 1854, is the contract under which the exchange was effected. 855

The United States desired to open up this resertion for settlement, as it was known to be a fertile and well watered tract, in every way suitable and desirable for agricultural and other purposes.

The Sioux half-breed could locate his scrip on the land within the boundaries of the reservation, and had all of them done so, little, if any

land, would have been opened for settlement and cultivation by its more progressive and enterprising citizens, unless the half-breed could sell his land procured under the location of his scrip.

If the sale of the land had been prohibited, the very purpose of securing the opening of the
856 reservation would have been defeated by the same Act which threw it open for settlement.

Obviously Congress did not intend that any such result should or could follow.

Why was it then that Congress inserted a provision in the contract prohibiting the alienation of the scrip?

As the half-breed could not sell his land at any time, why prohibit him from selling the thing that represented it?

857 Was it for the protection of the half-breed or merely for the convenience of the government, or were both these things taken into consideration by Congress in inserting the provision?

If the intent was to at least give the half-breed partial protection from his shrewd and worldly wise white brethren, then the extent of that protection seems to have been to see that by no method whatsoever should the title to the lands secured by the location of the scrip be taken
858 in the name of any other person than the original scripee. If any further or added protection had been deemed necessary or desirable, would not Congress have expressly prohibited the alienation of the land to be acquired until after patent should be issued or for such other period as in its judgment seemed fit?

If the intent was to relieve the Land Office Department of the burden of settling the contro-

versies of various parties who might claim to own or be entitled to locate the scrip, it offers a fairly good reason for the proviso. Had the scrip been made assignable, the assignee would have been entitled to enter the land in his own name.

Were the scrip assignable, it opened an avenue for controversies over the scrip in the Land 859
Office that Congress doubtless did not care to burden it with. Were the scrip unassignable, it made it a very simple matter for the Land Department, as in no case could controversy arise over the title as it was to be always issued in the name of the half-breed. By this method the half-breed was sure of obtaining title in his own name to the land located under his scrip; by the same provision the government relieved itself of all responsibility beyond the mere clerical work of locating the scrip 860
in the name of the proper party. If controversies arose as to the ownership of the land after location of the scrip, the government was in a position to say (as Judge Otto said) "Such matters must be settled in court and not in the forum which I have created to determine to whom I shall first issue title to my public land; that question I have already determined in favor of the half-breed; my Land Department has no further jurisdiction in the matter; go to the courts to settle your differences." 861

Suppose that the provision of the Act of Congress had been as follows: "Provided, however, that in all cases of location of the scrip hereby authorized shall be in the name of the party originally entitled thereto, and title to the land acquired thereby shall be issued to such scripee," would not such a provision have been fully as effectual a prohibition of transfer or conveyance of the scrip as the one actually enacted? Such a provision as

supposed would have made the scrip unassignable but would not affect the right of the scripee to deal with the land itself as he saw fit.

Ordinarily what one may do in person he may do by attorney.

It will probably be conceded that had there
862 been nothing further in this case than a power of attorney to Eaton to locate the scrip, and had Eaton proceeded under such power to locate the land in question for and on behalf of Orillie Stram nee Moreau, and for her sole use and benefit, that such location would have been valid.

It is claimed, however, that by reason of the fact that another power of attorney was given to Merritt authorizing him to convey the lands ac-
863 quired under the scrip location made by Eaton in the name of Stram, and by reason of the fact that under the agreement the title to the land secured by the location of the scrip was not to enure to the benefit of Stram, the location of the scrip was invalid and therefore Stram acquired no legal right to the property; that the Land Office Department upon having the facts brought to its attention had the right, and it was its duty, to cancel such scrip location and to declare the land open for entry.

864 As has been pointed out, alienation of the land was not prohibited so that the claimed vice in the transaction—if vice there must be found in the power to locate given to Eaton together with the agreement that the scripee was to have no interest in the land when located. Was this transaction a conveyance or transfer of the scrip? If so, it was invalid. What could the scripee do with the scrip in person? Ask to have it located on certain

lands and title issue to her therefor. What she could do in person she could authorize her attorney to do for her. She could have obtained title to the land in controversy by applying in person; she did do it by attorney. Her attorney accomplished all that she could have done. What more can she or the Land Department ask? It is urged, however, that there was something more than this, viz: "She had conveyed the land itself or authorized its conveyance under the power of attorney to Merritt, therefore the location is invalid." 865

There being no restriction on her power to alienate, what prevented her from deeding any land she might acquire under her scrip or giving a power to convey when such location should be made? The plaintiff answers because the whole transaction was a mere device to avoid the prohibition of the Act against alienation of the scrip. She could not have conveyed or transferred the scrip directly and she cannot do it indirectly. Did she in effect transfer or convey her scrip to Eaton? The words "transfer and convey" signify a turning over,— a granting of a right held by the transferrer. 866

The prohibitory portion of the act did not forbid an ATTEMPTED transfer or conveyance; it inhibited the transfer or conveyance itself. What right did Eaton get in the scrip? Clearly none. As attorney in fact for Stram, he could locate it and claim title for her; she could do no more and so far as her rights in and to the scrip were concerned no change had taken place by reason of the various instruments executed by her. 867

Suppose that the transaction had been as follows: Orillie Stram and Eaton enter into an

agreement whereby Stram agrees to locate certain lands, Eaton agreeing to pay her $5,000.00 for all her rights in and to the scrip and for the land to be secured thereunder. Pursuant to said agreement Stram executes her deed or power of attorney to convey lands thereafter to be acquired and
868 delivers same, together with the scrip, to Eaton. The couple then proceed to the Local Land Office.

Stram takes from Eaton her scrip and asks to locate it on certain lands. The location is accepted and the scrip adjusted; thereafter a contest is initiated against the Stram location for the reason that under her agreement with Eaton she had in effect assigned her scrip and her going to the Land Office in person was a mere device to evade the provision of the law prohibiting the
869 transfer or conveyance of the scrip. Would such a contest be entertained for a moment? Would not the Land Department's answer be "She entered the land in person, exactly what she had a right to do; because she has sold the land or agreed to do so it is no concern of ours as there is nothing in the law prohibiting her from so doing."

If this is a correct answer on her personal application, is it not equally so upon her appli-
870 cation by attorney? The attempted transfer or conveyance of her scrip was not immoral, nor was the party to whom such purported transfer or conveyance was given a criminal. After the execution and delivery of all the documents evidencing the transfer of the scrip together with the delivery of the scrip itself she was as much the owner of the scrip as ever; the attempted transfer is simply ineffectual for any purpose.

Suppose that Orillie Stram had by written assignment on the scrip itself transferred and conveyed to Eaton the scrip in question, at the same time giving him a power of attorney to locate. Eaton presents the scrip and asks to have it located, exhibiting the writing thereon assigning and transferring the same to him. 871

He is met with the objection on the part of the Land Department that the scrip is unassignable and they cannot recognize the same. Certainly here is a plain case of assignment, but is there any penalty for it? Certainly not. Stram can still locate her scrip as she sees fit. If she walks in on the instant, she can immediately locate it on lands subject to entry. She is not penalised in any way. Suppose that Eaton after being met with a refusal to locate on the strength of the 872
written transfer, produces his power of attorney to locate for Stram. Will his application be accepted? Certainly. And why? For the reason that the location is in the name of Stram and title is issued to her,—just what the government contracted it would do. The pretended assignment was ineffectual for any purpose; of no force and effect and was of no more consequence as between any of the parties than if it had never been written. Suppose, however, that the Local 873
Land officers knew so little about the law that they had accepted the assignment of the scrip and located the same on lands selected by Eaton and issued to him the title as assignee of the scrip. Upon contest the Land Department pronounces the location invalid.

Clearly the department would be right for the reason that a transfer has been made and ac-

cepted and the prohibition of the Act of Congress violated thereby. Suppose that the Local Land officers had accepted the scrip on the assignment written thereon, but had issued the receipt showing the title to be in Stram. Would this be a valid location? Clearly not, for the reason that the attempted transfer or conveyance
874 gave no right or authority to the named transferree therein to do anything in or about the scrip.

There would be no authority for its location and it would therefore be invalid against the objection of a contestant whose rights were prejudiced thereby. In my opinion Stram had a perfect legal right to authorize Eaton to act as her attorney to locate the land. She had also the
875 right to sell the land to be acquired thereby and as an incident to the carrying into effect of such sale to give to Merritt a power of attorney to convey the lands acquired under such location. She was not obliged to go through the idle ceremony of coming to the Land Office in person, for she could do by attorney what she could do herself. The power of attorney to locate was not subject to explanation, it being regular on its face. She, and she alone, could question it. It
876 being unchallenged on her part, or thereafter ratified, all acts done under it were and are binding upon her and all others connected therewith. The case of Gilbert vs. Thompson, 14 Minn., page 414, is as I view it authority for this position, if it needs authority to justify it. The remarks of Justice Gilfillan are so applicable in many ways that I quote them IN EXTENSO.

"The Acts of Congress of 1854 on which Sioux half-breed scrip was

issued provides that 'No transfer or conveyance of any of said certificates or scrip shall be valid.' It was the intention of Congress that the right to acquire public lands by means of this scrip should be a personal right in the one to whom the scrip issued and not property in the sense of being assignable; but no restraint 877
is imposed upon the right of property in the land after it is acquired by location of the scrip. In the scrip itself the half-breed had nothing which she could transfer to another, but his title to the land when perfected under it was as absolute as though acquired in any other way.

It follows that any attempt to transfer the scrip directly or indirectly would be of no effect as a transfer. The title to the scrip would remain in him and the title to the land acquired by it 878
would vest in him just as though no such attempt had been made.

Such attempt to transfer would not involve any moral turpitude nor the breach of any legal duty as is the case with an attempt to transfer a pre-emptive right. It would be simply ineffectual because the scrip is not transferrable. A power of attorney, so far as intended to operate as a transfer, would be of no avail; the right of the half-breed in the scrip and land would 879
remain the same; it would not be made irrevocable nor create any interest in the attorney. Should the attorney sell under it, he would be accountable to his principal, precisely as in the case of any power to sell, but a simple power to sell executed by the half-breed is good till revoked and would extend to land subsequently acquired by means of scrip if such land came within its terms. We think such a power could

not be varied by parol proof that the parties had an intention not expressed in it even to defeat the power except on the same ground as will admit such proof in other cases. The intent to transfer the scrip not being illegal but only ineffectual could not affect the power
880 where not expressed in the same instrument or in one equal in degree as evidence."

The case of Felix vs. Patrick is relied upon as an authority favoring the plaintiff's contention in this case. It will be remembered that the plaintiff contends that the power of attorney to Eaton and the power of attorney to Merritt were a mere device to avoid the prohibition contained in the Act against the alienation of the scrip.

881 In the case cited, the Court says:

"The device of a blank power of attorney and quit claim deed was doubtless resorted to for the purpose of evading the provision of the Act of Congress that no transfer or conveyance of the scrip issued under such Act should be valid. This rendered it necessary that the scrip should be located in the name and for the benefit of the person to whom it was issued, but from the moment the scrip was located and the title
882 in the land vested in Sophia Felix, it became subject to her disposition precisely as any other land would be."

"In order, therefore, for the purchaser of this scrip from Sophia Felix to make the same available, it became necessary to procure a power of attorney or a deed for the land."

"As the bill alleges that Patrick obtained possession of these instruments, while still in

blank, he is clearly chargeable with notice that they were intended as a device to evade the law against the assignment of scrip."

"Having then no right to locate the scrip for his own benefit he must be deemed to have located it for Sophia Felix and as her representative."

883

THE FELIX vs. PATRICK CASE.

For the purpose of argument let it be conceded that the power of attorney to Eaton and the power of attorney to Merritt constituted a mere device for evading the prohibition against the transfer or conveyance of the scrip. Would not the result be, under the doctrine of Felix vs. Patrick, to place the title to the land in Orillie Stram?

884

The case of Felix vs. Patrick seems to assume that the LOCATION WAS VALID, but that the quit claim deed being a device to evade the prohibition of the Act of Congress was ineffectual and that Patrick would be deemed a mere trustee for Felix.

In the case at bar the power of attorney to locate it and of itself was a perfectly valid and legal instrument, not transgressing either in spirit or letter the prohibition contained in the statute.

885

How then can it be said that because the parties executed another and independent instrument which was intended to evade the prohibition that it rendered the first and otherwise valid instrument invalid? The land was located under a valid power, one not even subject to parol explanation (Gilbert vs. Thompson, 14 Minn., 414 Gil.). Title was obtained to the land under such scrip location in the name of Orillie Stram, nee

Moreau, all that the government ever contracted to be done. Who was injured?

Clearly not Stram because she gave the power to locate and affirms that she wanted the land. Certainly not the government for it had agreed to give Stram certain lands for the scrip and
886 and had carried out its agreement.

But the plaintiff urges that Stram had given a power of attorney to convey the land and had no further interest in it, therefore her location was invalid.

Under the doctrine announced in Felix vs. Patrick, giving it the most liberal construction that can be urged, the power of attorney to convey was invalid and of no force or effect and
887 without regard to what the parties intended or attempted to do the equitable title was still in Stram.

Suppose that the transaction in this case had been as follows:

Stram gave a power of attorney to Eaton to locate the scrip and at the same time by parol, agreed that as soon as the scrip was located he would give to Eaton a deed for the land so locat-
888 ed that the consideration for such parol agreement was the sum of $500.00 in hand paid, and that Stram under such parol agreement had agreed that she neither had nor claimed to have any further right, title or interest either in the scrip or to the land to be located thereunder. Pursuant to such agreement the scrip was located; upon contest it was made to appear that such parol agreement had been entered into between Stram and Eaton. Would it in any way invali-

date the scrip location which was made under a power regular upon its face?

Clearly the parol agreement had no effect for it was void under the statute of frauds and no evidence of it could be received. How could it affect the power to locate? Is there under the doctrine announced in Felix vs. Patrick any distinc- 889
tion to be drawn between an oral agreement to convey and one evidenced in writing so far as it affects the location of the scrip. The oral agreement is void for two reasons:

1st. The statute of frauds.

2nd. It being an attempt to evade the prohibition against alienation contained in the Act of Congress.

The written agreement is void for but one 890
reason, viz: The prohibition of the Act of Congress.

It is a rule so well known as to need no citation of authority that the valid act of parties will always be upheld and where an instrument contains provisions some valid and some invalid full force and effect will be given to the valid provisions and that those held invalid will be disregarded as of no force or effect,—treated as mere surplusage. 891

This rule of construction always obtains unless the valid and invalid provisions are so intimately related as to be incapable of separation in which case the whole instrument must fail.

In the case at bar we have:

1st. A power of attorney to Eaton to locate the scrip; standing alone its validity is conceded.

2nd. A power of attorney to Merritt to convey certain lands to be secured under the scrip location coupled with a parol agreement that the principal shall have no further interest in either the scrip or land.

It is apparent that after the scrip is located
892 in the name of the scripee that she has no further interest in the scrip. By the act of location the scrip becomes the property of the United States and its contract is cancelled.

Nothing then remains but the land. In relation to this the scripee has made an agreement (power of attorney) which is of no force or effect. Her attempt and Eaton's attempt to avoid the prohibitory portion of the Act of Congress are unavailing, the title still remaining under the
893 law in the scripee. She needs no protection for the law gives it to her fully and absolutely. The government needs no protection for it has given what it contracted to give. The scripee not needing the good offices of the government and the government not having been in any way imposed upon, the need for its services in the matter is at an end and it has merely the clerical duty of issuing to the scripee her patent in the usual course of business.

894 It is true the government might have said upon all the facts presented that "Stram and Eaton TRIED to avoid one of the provisions which I had made relative to the scrip which I issued to Stram, but owing to the law of the land as announced in Felix vs. Patrick, the attempt was a signal failure and I have no further interest in the matter. Stram has her land, the power of attorney to Merritt and the deed to Eaton to the contrary notwithstanding.

I have my scrip and the contract originally made by me is settled. This being so, I now relegate Orillie Stram to the courts in common with all other of my citizens."

In my opinion the location of the scrip by Eaton as attorney for Stram is valid.

THIRTY YEARS OF ACQUIESCENCE IN CONSTRUING THE ACT OF CONGRESS AS AUTHORIZING TRANSACTIONS OF THE SAME KIND AS THE ONE AT BAR. 895

From 1854 to 1886 no question was ever raised by the Local and General Land Office or any contestant as to the legality of locating scrip in the way it was done in the case at bar, except in the case of Felix vs. Carroll decided in 1863. In that case, as heretofore pointed out, it was held to be a valid location. 896

From 1863 to 1886 it never occurred to anyone to contest the scrip location on the ground of invalidity of the scrip location, although in practically every case the method adopted to locate the scrip was precisely the same as in the case at bar. The people generally,—lawyers and laymen, halfbreeds and Land Office officials,—all took the same view of it; thousands of titles are founded upon scrip locations made in exactly the same way. Is a construction to be now given at this late day which will overturn substantially all the scrip locations ever made under this act? If such a construction is to obtain it must be for very urgent and satisfactory reasons. Titles to our cities (Felix vs. Patrick, City of Omaha) our iron mines and agricultural lands are called in question though for thirty years no one ever dreamed of so doing. 897

Is not the claim a little stale? Who is harmed by holding the location good? Certainly not the plaintiff. It simply will not get something it hoped to get. If plaintiff paid the government anything or used other scrip in making this location it will receive the same back, if the government
898 was in error in accepting it and plaintiff will be placed in STATU QUO. Certainly not Stram for she affirmed all the acts of her attorney. The government is not harmed for it has neither been imposed upon nor defrauded. It received back its scrip for the land and has thereby cancelled its contract. If all other reasons fail it seems to me that it is the duty of the court to announce the rule "That this method of securing titles having been for thirty years so universally adopted hav-
899 ing been universally acquiesced in by lawyers and laymen, numberless titles being founded thereon, it is now too late to call the proceedure into question. It has become a rule of property and whether or not the common construction placed upon the act was right or wrong, it will now be acquiesced in by the courts, as irreparable injury would be done to thousands by holding such location invalid and no harm will be done to anyone by holding such location valid."

900 "The violation of the contract of 1854, if violation it was, has harmed no one. Plaintiff in this case is simply trying to take from defendants property acquired in good faith under a location made as thousands of others were. Their title by common consent was good at the time the location was made and it cannot now be questioned."

It seems to me that this rule is equitable and just and in the absence of all other reasons ought to be controlling. In my judgment the Hon. Sec-

retary of the Interior erred in holding such scrip location invalid. As a matter of law he should have awarded the land in controversy to Orillie Stram, nee Moreau.

As Orillie Stram, nee Moreau, has given a subsequent deed of the premises to Eaton and it is conceded that Eaton and his grantees hold 901
whatever title Orillie Stram, nee Moreau, may have had, it follows that the plaintiff's cause of action fails and that judgment should be entered in favor of the defendants.

It has accordingly been so ordered.

S. H. MOER,
Judge.

The original of the foregoing is endorsed on the back as follows:

15331. THE MIDWAY CO. vs. FRANK W. 902
EATON, ET AL.

JUDGE'S MEMORANDUM.

Filed in my office at 8 o'clock P. M., Dec. 30, 1899.

GEO. F. CHESTER,
Clerk of District Court.
By H. C. WEDMARK, Deputy.

903

STATE OF MINNESOTA, COUNTY OF ST. Louis, District Court, Eleventh Judicial District.

---

904 THE MIDWAY COMPANY, A CORPORATION, Plaintiff.

vs.

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN, AND MARGARETHA LONSTORF, Defendants.

905

JUDGMENT.

This cause having come on for trial at the General May, 1899 Term of said Court, before Hon. S. H. Moer, one of the judges of said court, presiding without a jury.

906 Messrs. Walter Ayers and P. H. Seymour, appearing as attorneys for the plaintiff; and Messrs. J. L. Washburn and W. D. Bailey appearing as attorneys for the defendants Clark and Fagan and Merritt; Mr. W. B. Phelps appearing as attorney for the defendant Lonstorf and Messrs. Towne & Harris and Frank Cutting appearing as attorneys for defendant Frank W. Eaton, and the cause proceeding regularly to trial and the respective parties having produced their

evidence before the Court and thereafter the cause having been duly argued by the attorneys for the plaintiff and defendants, and the Court being fully advised in the premises having made and filed its findings of fact and conclusions of law in said matter on the 27th day of December, 1899.

NOW THEREFORE, On motion of all of the 907
above named attorneys for the defendants, it is hereby ordered, adjudged and agreed as follows:

1. IT IS ADJUDGED, DETERMINED AND DECREED that the defendant, Frank W. Eaton, is the owner of an undivided thirteen thirty-sixths (13-36) of the premises described in the complaint, to-wit: Lots No. three (3), five (5) and six (6) of section thirty (30) in township sixty-three (63) north of range eleven (11) west, of the fourth 908
principal meridian in the County of St. Louis and State of Minnesota; that the defendant Merrill M. Clark is the owner of an undivided nine thirty-sixths (9-36) of said premises; that the defendant Margaretha Lonstorf is the owner of an undivided eight thirty-sixths (8-36) thereof and the defendant Richard H. Fagan is the owner of an undivided six thirty-sixths (6-36) thereof, and said parties were entitled to have and receive patent therefor from the government of the United 909
States.

2. IT IS FURTHER ADJUDGED, DETERMINED AND DECREED, That the plaintiff is not entitled to any right, title or interest in or to said lands or any of them, and that the plaintiff's predecessor, one Frank Hicks, to whom patent issued therefor from the United States was not entitled to have and receive said patent and that whatever title accrued thereby was at most the

bare legal title, subject to all of the rights and interests of said defendants hereinbefore named, and that said Frank Hicks held said title as trustee in trust for the said several defendants, and that the plaintiff, who has succeeded to whatever legal title the said Hicks acquired by virtue of said
910 patent, with full knowledge of the rights of said defendants, holds the same in trust for the said several defendants in the proportions hereinbefore decreed; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the said plaintiff having no other right, title or interest in or lien upon said premises, convey said premises to the said defendants in the proportions above decreed, failing so to do, that this judgment shall operate to ef-
911 fectually transfer and vest whatever title is held by said plaintiff, accruing by virtue of said patent, in the said several defendants in the proportions above specified, upon the recording of a certified copy hereof in the office of the Register of Deeds of the County in which said land is situated; and,

IT IS FURTHER ADJUDGED, DETERMINED AND DECREED, that the defendants are the owners of both the legal and equitable title
912 to said premises in the proportions hereinbefore specified and that the plaintiff has no right, title or interest therein.

3. IT IS FURTHER ADJUDGED, DETERMINED AND DECREED, That the said defendants, Eaton, Clark, Fagan and Lonstorf have and recover of and from the said plaintiff their costs and disbursements herein taxed at $61.00.

Witness the Honorable S. H. Moer, Judge of the District Court aforesaid, at Duluth, this 2nd day of January, in the year of our Lord, 1900.

GEORGE F. CHESTER,
Clerk.

By A. J. TAYLOR,
Deputy Clerk. 913

STATE OF MINNESOTA, COUNTY OF ST. Louis. District Court, Eleventh Judicial District.

THE MIDWAY COMPANY, Plaintiff, 914

vs.

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN, AND MARGARETHA LONSTORF, Defendants.

NOTICE. 915

To Messrs. Washburn, Lewis & Bailey, L. C. Harris and Frank Cutting, and Phelps & McClintock, attorneys for the above named defendants, and to George F. Chester, Clerk of said District Court:

PLEASE TAKE NOTICE, That the above named plaintiff, The Midway Company, appeals to the Supreme Court of the state of Minnesota, from the order of the said District Court entered herein on the 28th day of December, A. D. 1899, denying plaintiff's motion for a new trial, and also from the judgment entered herein against the said plaintiff on the second day of January, A. D. 1900, and from the whole thereof.

Dated this 3rd day of January, A. D. 1900.

WALTER AYERS,
Attorney for Plaintiff.

P. H. SEYMOUR,
Of Counsel.

Filed Jan. 3, 1900.

Due and personal service of the within notice of appeal and undertaking accompanying same is hereby admitted at Duluth, Minn., this 3rd day of January, A. D. 1900.

J. L. WASHBURN AND
W. D. BAILEY,
Attorneys for Merritt, Clark and Fagan.

L. C. HARRIS AND
FRANK CUTTING,
TOWNE & HARRIS,
Attorneys for F. W. Eaton.

PHELPS & McCLINTOCK,
Attorneys for Margaretha Lonstorf.

GEORGE F. CHESTER,
Clerk of District Court, St. Louis Co.

307 STATE OF MINNESOTA, } ss:
County of St. Louis, }

In District Court, 11th Judicial District.

THE MIDWAY COMPANY, Plaintiff,
vs.
FRANK W. EATON, LEONIDAS MERRITT, RICHARD M. FAGAN, and Merrill M. Clark, Defendants.

Comes now the defendant Frank W. Eaton and, answering the complaint of the plaintiff herein for himself alone, denies each and every allegation, matter, and thing in said complaint contained save and except as the same is hereinafter admitted, qualified, or explained.

2. This defendant denies that the plaintiff is the owner of the lands described in the complaint or any part thereof, or has any right, title, or interest in the same, and denies that the plaintiff is in the possession of the same or any part thereof.

3. This defendant admits that the lands described in said complaint are in the county of St. Louis and State of Minnesota.

4. This defendant admits that he claims an interest in said lands and alleges the fact to be that he is the owner of thirteen-thirty-sixths undivided interest in the premises described in said complaint, and upon information and belief alleges that Merrill M. Clark is the owner of nine-thirty-sixths, Margaretha Lonstorf of eight-thirty-sixths, and Richard H. Fagan six-thirty-sixths of said premises described in the complaint.

5. This defendant, further answering said complaint, both by way of defence and for affirmative relief, alleges the foundation and basis of his right and title to said premises hereinbefore described to be as follows, to wit:

308 That on the 17th day of July, 1854, the Congress of the United States passed an act entitled "An act to authorize the President of the United States to cause to be surveyed a tract of land in the Territory of Minnesota belonging to the half-breeds and mixed bloods of the Dakota — Sioux nation of Indians, and for other purposes," by which act the President of the United — was and became authorized to exchange with the half-breeds and mixed bloods of the Dakota or Sioux nation of Indians, who were entitled to an interest therein, for the tract of land lying on the west side of Lake Pepin and Mississippi river, in the then Territory of Minnesota, which had been theretofore set apart and granted for their use and benefit by the ninth article of the treaty of Prairie du Chien on the 15th day of July, 1830, and for that purpose by the said act the President of the United States was authorized to cause to be issued to the said persons, on the execution by them or by the legal representatives of such as were minors, of a full and complete relinquishment to the United States of all their right, title, and interest, according to such form as should be prescribed by the Commissioner of the General Land Office, in and to said tract of land or reserva-

tion, certificates of scrip of the amount to which each individual would be entitled of said land or reservation, *pro rata*, among the claimants, which said certificates or scrip it was by said act provided might be located upon any of the said lands within said reservation not then occupied by actual, *bona fide* settlers of the half-breeds or mixed bloods, or such other persons as had gone into said Territory by authority of law, or upon any other unoccupied lands of the United States subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by the Government upon which they respectively should make improvements—

It being further provided in said act that said certificates or scrip should not embrace more than 640 nor less than 40 acres each,
309 and that the same should be equally apportioned, as nearly as practicable, among those entitled to an interest in said reservation; that it was further provided in and by the terms of said act that the President was authorized to cause to be ascertained the number of the half-breeds and mixed bloods who were entitled to participate in said grant or reservation, and to issue the scrip or certificates provided for in said act; that the said act of Congress was approved July 17th, 1854, and became of force on and after said date, and the same is codified and published in the tenth volume of the United States Statutes at Large, on page 304, and is hereby made a part of this complaint as fully and in all respects as though the same were set forth at length.

6. That, pursuant to the provisions of said act, the President of the United States caused the number and name of the said half-breeds and mixed bloods who were entitled to participate in the benefits of said grant or reservation to be ascertained, and the said persons so entitled to the benefits thereof duly executed a full and complete relinquishment to the United States of all their right, title, and interest, in the manner prescribed by the Commissioner of the General Land Office, in and to said tract of land or reservation, and the said tract of land or reservation thereby became fully relinquished to the United States Government, which proceeded to open up the same for settlement in accordance with the public land laws of the United States.

7. That in consideration of said relinquishment to the United States by the said persons entitled to the benefits of the said reservation, and of all their rights, title, and interest therein, to the United States, pursuant to the provisions of said act, the President of the United States caused to be issued to the several persons entitled to the benefits of said act certificates or scrip for the same
310 amount of land to which each of such persons was found to be entitled in case of a division of the said grant or reservation, which said certificates or scrip were, under the provisions of said act, locatable upon any of the lands within said reservation not then occupied by actual settlers of the classes mentioned in said act, or upon any other unoccupied lands of the United States subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by the Government upon which they should respectively make improvements.

8. That one of the persons entitled to the benefits of said act and who joined with others of her nation in surrendering to the United States all her right, title, and interest in and to said reservation, and who executed due and proper relinquishment thereof, was one Orille Moreau, a half-breed of the said nation, who afterwards intermarried with one Roman Stram.

9. That under and by virtue of said act of Congress the said Orille Moreau became entitled to certificates of scrip enabling her to take 320 acres of land of the classes mentioned in said act, and that on or about November 23, 1856, certificates of such scrip were duly issued to her, numbered 19 E and 19 D, each of said certificates being for 160 acres.

10. That on June 16th, 1883, the said Orille Moreau, then Orille Stram, never having theretofore made any use of said certificates or scrip, through this defendant, Frank W. Eaton, who had been theretofore duly empowered as her attorney-in-fact for that purpose, presented said scrip at the local land office at Duluth, Minnesota, and then and there made application to locate the same on certain unsurveyed lands in the said land district, and by virtue of said application and said certificates of scrip did enter and take the following-described lands, to wit:

311 Starting at the quarter post on the east line of section 25, township 63 north, of range 12 west, and thence running east 240 rods for a place of beginning, thence south 80 rods, thence east 80 rods, thence north 80 rods, thence east 80 rods, thence north 160 rods, thence west 80 rods, thence south 80 rods, thence west 80 rods, thence south 80 rods to the place of beginning, the same being located under scrip number 19 E; also commencing at the quarter post on the east line of section 25, in township 63 north of range 12 west, running thence north on said section line 80 rods, thence east 80 rods, thence north 80 rods, thence east 80 rods, thence south 80 rods, thence east 80 rods, thence south 80 rods, thence west 240 rods to the place of beginning, the same being located under scrip number 19 D, each of said locations embracing 160 acres, the same not being lands reserved by the United States for any purpose whatsoever. The said scrip and the said applications, together with complete and correct diagrams and descriptions of the proposed locations, were filed in the local office on the 16th day of June, 1883, and were duly accepted by the local land officers, and prior to the location of the said certificates of scrip substantial improvements had been made upon each of said pieces of land by and under the authority and for the benefit of the said Orille Stram, and she in all respects fully complied with the provisions of said act of Congress in locating said certificates of scrip on the premises hereinbefore described.

11. That on or about the 20th day of July, 1885, said lands having been duly surveyed and platted, the plat and survey of the said township and of said lands was duly filed in the local land office at Duluth, Minnesota, and on the 21st day of July, 1885, upon the application of the said Orille Stram, acting through her duly appointed attorney-in-fact, said certificate of Sioux half-breed

scrip number 19 D was adjusted to lots three (3), five (5), and six (6),
and the southeast quarter of the northwest quarter of section
312 thirty (30), in township sixty-three (63) rorth of range eleven
(11) west, and said certificate number 19 E was adjusted upon lots one (1) and two (2) and the southwest quarter of the northeast quarter and the northwest quarter of the southeast quarter of section 30, township 63 north of range 11 west, being the same lands hereinbefore described by metes and bounds, and then and there and on that day said certificates of scrip were duly located upon said surveyed lands, and the said lands as surveyed lands were duly taken and appropriated under and by virtue of said scrip, and the locations of said scrip were at said time duly and properly allowed by the officers of the local office at Duluth, Minnesota, there not being at said time nor at the time when said certificates of scrip were located on said unsurveyed lands nor at any other time any valid adverse claims to said lands, and on the said 21st day of July, 1885, receiver's receipts and certificates of entry and filing were duly and regularly issued to the said Orille Stram, which were duly and regurlarly recorded in the office of the register of deeds where the said lands are located, and have ever since remained of record therein.

12. And this defendant alleges the fact to be that thereupon the said scrip became satisfied and the obligations of the United States, in consideration of the surrender by the said Orille Stram of her interest in said reservation and in said certificates of scrip, became discharged, and the said lands taken and located under said scrip became the property and estate of the said Orille Stram and those claiming by, through, or under her, without regard to the issuance of any patent by the Government of the United States.

13. That about the time of the adjustment of the said scrip to the said lands to the satisfaction and extinguishment of said scrip one Thomas Hyde made an application to make a pre-emption filing
upon lots 5 and 6 and the southeast quarter of the northwest
313 quarter of said section, which application was denied by the
local officers at Duluth, Minnesota, and on or about the same time one Angus McDonald made a like application on lot two (2) and the north half of the southeast quarter and the southwest quarter of the northeast quarter of said section, which application was also denied by the local officers, both on the grounds that said lands had already been appropriated by the location of the said scrip thereon, and also that the applications of the said Hyde and McDonald were not made in good faith, but were made in fraud and in violation of the pre-emption laws and were affected by a fraudulent and unlawful intent, rendering the same invalid, and that it was duly determined by the local officers, and sustained by decision of the department, that neither the said Hyde or McDonald ever had or obtained any rights whatsoever in or to the said lands by virtue of said pre-emption filings or by virtue of any subsequent proceedings on their part or either of them; but that, notwithstanding the same, the said Hyde and McDonald made and attack upon the Land Department some time in November, 1885, upon the location of the said certificates of scrip and on the entry of the said

lands thereunder, charging that the said Orille Stram had never made any improvements upon said lands, either in person or by agent and attorney, and that the same at the time of the first filing thereof, as hereinbefore set forth, were unsurveyed lands and could be located only after such improvements had been made, and supported the same by an affidavit which had by misrepresentation been obtained from the said Orille Stram, in which she denied giving such power to this defendant, Frank W. Eaton, or any authority to locate the scrip or erect buildings or make improvements on the lands in controversy or any land for her use and benefit, which charges culminated in a hearing thereon in the local office at Duluth, Minnesota, on the 6th day of April, 1886, resulting

314 in a decision of the said land officers sustaining the said scrip locations, in which decision the local land officers held, among other things—

That the scrip in question was located upon unsurveyed lands on June 16th, 1883, more than one year before the pre-emptors Hyde and McDonald settled thereon, and was adjusted to the surveys July 21, 1885.

That the records contained duly executed powers of attorneys from the scripee and her husband to this defendant, Frank W. Eaton, giving him full power to do all things necessary to secure *bona fide* locations of the said scrip.

That this defendant, Eaton, under said authority employed another to go upon the land and make suitable improvements, giving instructions what improvements to make and how to make them, which improvements were made for this defendant and for the purposes claimed by him.

That the said scripee, while stating in said affidavit that she did not know this defendant and never authorized him to make improvements on the lands, did not appear at the hearing to testify in support of the charges made, and that she never asked that the locations be cancelled and the scrip be returned to her, but, on the contrary, between the date of said affidavit and day of hearing, executed and delivered a deed of confirmation, acknowledging, ratifying, and confirming all that had been done by this defendant as her attorney.

And further decided that there was nothing in the evidence to show that the scripee was mislead or imposed upon by this defendant or his agents, nor to controvert the fact that the scrip locations were effected in conformity with the usual and accepted practice in such cases, and in accordance with the law and the rules of the Land Department, and held that the contestants had failed to make out a case, and that the scrip locations should stand.

From that decision contestants Hyde and McDonald appealed to the General Land Office, assigning six specifications of error;

315 among others, that the local officers had treated the case as if the controversy was between the scripee and her attorney-in-fact, whereas it grew out of a contest by third parties, and that the local officers had failed to pass upon the question whether the land contained improvements made by or under the personal supervision

or direction of the scripee and for her personal use and benefit, and erred in finding that a confirmatory deed made between two of the parties could bar the right of subsequent *bona fide* applicants.

Pending said proceedings on appeal other parties made application to contest the said scrip locations and also to contest the preemption claims of said Hyde and McDonald, which, under the instructions of the Commissioner of the General Land Office, in August, 1887, were held subject to the final disposition of said appeal.

That upon said appeal said Commissioner made his decision and found that accompanying the scrip and said applications to locate the same were two original powers of attorney, given May 25, 1883, by the scripee and her husband to this defendant, and that with each application was an affidavit by this defendant setting out that under said powers of attorney he had caused to be built upon each of the tracts upon which scrip was located a house fourteen by sixteen feet, one story high, of timber, covered with split shingles, with doors and windows; that he had also cleared half an acre of each tract, and that said improvements were made under the personal direction of said scripee and for her personal use and benefit; and further decided that in the record there was an original power of attorney given by the said scripee and her husband to one Leonidas Merritt, granting him full power and authority to enter upon and take possession of any and all pi-ces of land in the State of Minnesota which they owned or might thereafter acquire by virtue of the location of the scrip in question, and to prosecute and defend
316 any suit at law in the courts of said State, and to grant, bargain, sell, demise, or lease the said lands in the same manner as if performed by them individually.

And further decided that in the record were certified copies of warranty deeds, dated July 2nd, 1883, executed by said Leonidas Merritt in the name of the said scripee and her husband, under and by virtue of the power of attorney above named, conveying to Edward Byrns, Joseph A. Powers, and Edward Clement an undivided one-third interest in and to the lands embraced in said scrip locations involved in said controversy, the consideration stated in said deed being $25,000; also certified copies of two warranty deeds, dated July 6, 1883, executed in the same manner by the same party, conveying to this defendant an undivided two-thirds interest in and to said tract of land, the consideration named in each being $25,000; also that Joseph Clement, the grantee of an undivided third interest, above mentioned, on August 23, 1883, as appears by certified copies of two deeds of warranty on file, conveyed to one Nicholas Lonstorf his undivided one-ninth interest in and to said tracts, the consideration named being two hundred and fifty dollars, and that on August 29th, 1883, as shown by certified copies on file, Joseph Powers, another of the grantees of an undivided third interest, executed two similar deeds, conveying to said Lonstorf his undivided one-ninth interest in and to said tracts, the consideration named being three hundred and fifty dollars in each deed; and also that the record contained quitclaim deeds correcting faulty descriptions in said previous deeds, said decision holding that a two-ninths in-

terest under said scrip locations had vested in said Lonstorf, one-ninth in Edward Byrns, and six-ninths in this defendant, Frank W. Eaton.

The said Commissioner further decided that said several deeds of conveyance conferred no greater title upon the grantee than the grantors had, which he held was simply a right to these tracts
317 of land subject to the final adjudication and approval of the loations; said Commissioner also found that prior to the hearing before the local land office, on March 31st, 1886, the scripee, Orille Stram, and her husband joined in a deed of confirmation ratifying and confirming all the acts of this defendant and Leonidas Merritt relative to acquiring the said lands under and by virtue of said certificates of scrip.

The said Commissioner further determined in said decision that the record before him established by a clear preponderance the fact that this defendant, by virtue of his power of attorney, employed Edward Byrns to — the improvements upon the respective tracts in question, and that Byrns procured the services of Powers and Clement to assist him therein; that this defendant admits that the power of attorney under which he acted was executed by the said scripee in blank, and that he had never seen the said scripee until March 31st, 1886; that he had not himself seen the land and did not know whether the scripee had seen it or not; that the deed of confirmation of the scripee appears, so far as she and this defendant are concerned, to remove any objection to the acts previously performed by the latter under and by virtue of the said power of attorney, and that the affidavits accompanying the location of said scrip appear to fulfill the requirements of the circular of May 28th, 1878, as printed in 5 Copp's Land-owner, 126.

The said Commissioner further decided in said decision that the only question left to pass upon touching the legality of said scrip locations was whether the power of attorney given by said scripee to this defendant could carry with it under the law the power and authority to make the improvements necessary as a prerequisite to valid location of the scrip on unsurveyed lands, and held that since the evidence showed that the scripee never saw the lands or the improvements, and since the circular above referred to required that the Indian should have direct connection with the land and
318 claim the same for his personal use, that the scrip locations were not valid and should be cancelled as speculative and made with evident intent to evade the law rather than to comply with it.

That an appeal was taken to the General Land Office, to the Secretary of the Interior, on or about August 4th, 1888, by said Orille Stram and this defendant, her attorney-in-fact, and the said parties in interest, it being assigned as specifications of error on said appeal, among other things, that the said Commissioner erred in holding that there was any failure in manner, form, or substance on the part of the scripee in locating said scrip or in making the improvements required on unsurveyed lands by the act of Congress approved July 17th, 1854, and in holding that improvements on unsurveyed

land subject to appropriation under said act must be made under the personal supervision and direction of the scripee and be for his personal use and benefit, and in holding that said acts of settlement and improvement may not be made by or through an agent or attorney, and in holding that the adjustment to the lines of the public surveys of a scrip location theretofore made by an agent of the scripee on unsurveyed lands, tho' assented to and ratified by the scripee, does not constitute a valid appropriation of the tract, and in not finding and holding that at the time of the adjustment of the said scrip to the lines of the public survey no valid right had attached to said land adversely to said scrip, and in not holding that at the date of said adjustment no right adverse thereto had attached to said land, and said adjustment was in legal contemplation and intent a location on surveyed land, and hence that no improvements were required as a condition precedent to a valid location, and in holding said scrip locations for cancellation, and *and* for failure to find and decide the questions in issue, both in law and fact, in favor of the title of the scripee.

That thereafter, on the 18th day of February, 1889, the
319 Hon. W. F. Vilas, then Secretary of the Interior, decided said cause on appeal, and held that the said scrip locations were invalid, which decision was afterwards, on the 28th day of January, 1891, confirmed by the Hon. John W. Noble, then Secretary of the Interior, it being also determined in the decisions of both Secretaries that neither Hyde nor McDonald nor any other person or persons had any right, title, or interest in or to said land or any part thereof, and assumed to determine and decide that the said lands were still public lands of the United States and open to entry.

That Secretary Vilas in and by the said decision held that the said scrip, being accompanied by two powers of attorney executed in blank, one giving to some one then not named power to locate the scrip, and the other giving like authority to sell the lands which might be located thereunder, operated as an assignment of the scrip, and assumed that the same, after many years passing through different hands, lodged in the hands of this defendant, who filled up the blanks in the powers of attorney and employed other- to make improvements on the land, and located the scrip as the attorney-in-fact of Orille Stram, and that the other power of attorney was filled out in the name of Leonidas Merritt, as the attorney-in-fact who executed the conveyances; that the scripee never saw the land and had not seen the same at the time this defendant located said scrip, nor had she ever seen this defendant at said time, and assumed the fact that she had sold the said scrip long prior to the location, and held that she had no interest in the land, and that her actual interest in the land ceased when she disposed of the scrip, which said Secretary assumed that she did when she executed said powers of attorney.

That said Secretary in said decision found that said Orille Stram, her husband joining, had ratified what had been done by
320 her said attorneys-in-fact, and found or assumed that said ratification was for a consideration, and held that such con-

firmation did not change the fact that the improvements and location, although made under the said power of attorney, were under the direction and in the interest of the said scripee, but in the interest of the acquisition of the land and in the interest of those who desired to acquire it through said scrip.

That in the decision of Secretary Noble above referred to, confirming the decision of Secretary Vilas, the case was not gone into in detail, Secretary Noble affirming the position taken by Secretary Vilas, and also affirming the decision of Secretary Vilas that no other parties had acquired any valid, adverse right whatsoever in and to said premises.

15. That said decisions of the said Secretaries rested upon a mistaken and erroneous interpretation of the law under which said scrip locations were made; among others, in this, that the power of attorney under which this defendant acted as the attorney-in-fact for Orille Stram in making said scrip locations and in filing said scrip and in entering said lands was in blank, in so far as the donee in said power was concerned, when first executed by the said scripee, and hence void; that the improvements made upon said lands in connection with the first filing of the scrip thereon were not made by Orille Stram in person or for her personal benefit and enjoyment, and that she had no personal connection with said land, and hence that the location of the said scrip on the said land was unlawful and invalid; that prior to the location of said scrip upon said land said Orille Stram had executed a power of attorney, to wit, to the said Leonidas Merritt, to sell and convey the lands which might be obtained under said scrip, and hence that by means of the two powers of attorney, the one to locate and the other to sell, an
321 assignment of the said scrip had been effected, contrary to the provisions of the statute, and hence that all proceedings had under the said powers of attorney to locate said scrip were invalid, notwithstanding that the said Orille Stram had thereafter in all respects confirmed the said acts of this defendant as her attorney-in-fact; that this defendant, prior to the location of said scrip, had not seen the said Orille Stram and did not know whether she had been upon the land personally or not, and hence that the location of the land in her name and under said scrip was invalid; that said decision rested upon an erroneous and unsupported assumption of fact that said certificates in the name of Orille Stram were disposed of by her under the two powers of attorney, the one to locate and the other to sell, and executed by her in blank, which after many years, passing through different hands, lodged in the hands of this defendant, who filled up the power to locate the same with his own name and empowered other persons to make slight improvements on the land, and thereupon located the scrip as the attorney for Orille Stram, and afterwards filled or caused to be filled the blank in the other power of attorney with the name of Leonidas Merritt, and that Orille Stram did not know at the time of the said acts of this defendant, whereas in truth and in fact there was nothing in the records of the said case, as the same was made before and presented to the said Secretaries, to justify

such conclusions and assumptions of fact, and whereas the same was and is contrary to the actual facts appearing in the record of said case, and whereas said conclusions and interpretations of law, as aforesaid, were erroneous, mistaken, and wrongful and contrary to the interpretations of law as made in numerous decisions of the Land Department and courts of the United States, the true facts being, as established in said record without contradiction, that the said Orille Stram did not make a sale of said scrip and never made any assignment thereof, and that shortly and but a few days before the
322 filing of said scrip upon said lands, and desirous of obtaining lands that she might have the benefit thereof and sell and dispose of the same after she should obtain the same and receive the benefits thereof, she executed and delivered said power of attorney under which this defendant acted in making said locations and under which he acted in making the improvements upon said lands, which improvements, this defendant alleges, were good and substantial improvements and in all respects complied with the law, as found by the local land officers, and that they were made for the purpose of acquiring said lands in the name of Orille Stram, to be disposed of, if she so desired, by her or under her authority, after the same should be so obtained; that the interpretation of the law by the said Secretaries that the said improvements had to be made in person or under the personal direction of or for the personal use and benefit of the scripee was erroneous, such law only requiring that as to unsurveyed lands improvements be made to the end that the same should be notice to other parties that claims had been made to such lands under such scrip, to prevent others from innocently entering upon said lands and making settlement thereon in ignorance of the claims of said parties under said scrip locations and to put all such persons on guard, that in truth and in fact it was immaterial whether such improvements were placed upon said lands by the scripee or some one in her behalf, for the reason that the full demands of the law are met when improvements are placed on such lands, whether placed thereon by the scripee in person or some one in her behalf.

16. Further, this defendant alleges that it was entirely immaterial whether the name of the donee in said power of attorney was filled in at the time of the first execution thereof or not, inasmuch as the said power of attorney, as was shown without dispute, was delivered to this defendant by the said Orille Stram, through
323 her agents, for the purpose of making said locations in the name of said Orille Stram, from which locations and the sale of the lands thereafter she expected to derive a consideration, and inasmuch as said locations are, in fact, made in her name, and inasmuch as said certificates of scrip were duly located in the name of Orille Stram, by this defendant acting as her attorney, the said Stram, by virtue of said acts, became, in law, the owner of said lands to the same extent as though she had taken all such steps in person.

Further, that at the time of the location of said scrip upon said lands, on July 21st, 1885, the plat of the survey of said township had

been made and filed, and there being, at that time, no valid adverse claims to said lands or any part thereof, no improvements whatsoever were required to render valid the location of said scrip upon said lands; and it should have been, by the said Secretaries, held, as in fact the law is, that such entry and such location of said land was in all respects valid, without regard to any improvements whatsoever, as there had been no intervening rights of any person or persons whatsoever between the time the said scrip was located on said lands as unsurveyed lands and the time the said scrip was finally adjusted to said lands.

That it was error to hold and so construe the law that in case the said Orille Stram desired to sell said lands, after they should be obtained, in order to derive the benefit from said sale to which she was entitled under the said certificates, for which she had theretofore paid the United States by the surrender of her rights, as aforesaid, in and to said reservation, that it was invalid for her to execute a power of attorney, whether in blank or otherwise, to sell the said lands, after the same should thus be located, even before the said scrip was filed upon said lands; and it was an erroneous interpretation of the law on the part of said Secretaries, and contrary to
324 the *the* previous rulings and practice of the Land Department, to hold that by said transactions a sale and assignment of the scrip was effected, or to hold that the acts of the said attorney-in-fact, this defendant, in the location of said scrip, by reason of said acts on the part of Orille Stram, were invalid, inasmuch as the said scrip, by the said attorney-in-fact, was located upon said lands, and the said lands were taken in the name of the said Orille Stram and subject to her disposal.

That the said decisions and interpretations of the law by the said Secretaries in holding that the said improvements were not made in the interest of the said scripee were erroneous in that the same *being* made in the interest of the entry of said lands for and in the name of the said scripee, and the locations of the said scrip thereon were in law made for the benefit and in the interest of said scripee and in support of said entry, and the law does not require said scripee to make the same in person, nor that the same be made for her personal use, nor that she should have direct connection with the land.

That the decisions of the said Secretaries in holding that after said scrip had been located upon said lands in the name of the said scripee the deed of confirmation thereof given by the said scripee, her husband joining, which was given to this defendant on or about March 31st, 1886, was ineffectual, were erroneous and based upon a mistaken construction of the law, inasmuch as said lands having been entered in the name of Orille Stram, whether the said power of attorney to sell the same was invalid or not, became immaterial, for the said scripee herself, as found by said decisions, confirmed the acts of the said attorney-in-fact to sell and convey said lands, and conveyed the same herself to those who were claiming thereunder; and erroneous further in this, that it was entirely competent and

lawful for the said scripee to act by and through another as
325 her attorney in the selection and location of said lands, and that if said power of attorney to sell and dispose of the same was invalid the said lands still remained the property of the said scripee until she executed and delivered said confirmatory deed, and up to the time of said decision no valid adverse claim attached to said lands.

17. That under and by the erroneous decisions of the said Secretaries it was attempted to throw said lands open for pre-emption or for the location of other scrip as public lands of the United States, and that by virtue of said erroneous decisions the Land Department of the United States assumed to allow, subsequent to the rendition of said decisions, other parties to come in and apply for the said lands, notwithstanding the fact that during all of this time this defendant and his codefendants were in possession of the lands on which said scrip had been located and all of the same when such proceedings were had pursuant to said erroneous decisions of said Land Department, to which said proceedings neither this defendant nor his co-defendants were parties.

After the decisions of the said Secretaries denying the validity of the said scrip locations, but the exact time of which is to defendant unknown, the Land Department of the United States, as defendant is informed and believes, pretended to allow one Frank Hicks to enter the lands described in the complaint, and thereafter, as defendant is informed and believes, issued a patent to the said Hicks for the said lands; but defendant alleges that he was not a party to any of the proceedings whereby the said Hicks was permitted to enter and obtain said lands, and further alleges that no right, title, or interest in and to said lands passed to the said Hicks by the said
326 pretended acts of the Land Department; and this defendant further alleges upon information and belief that the plaintiff obtained its pretended title to the lands mentioned in the complaint from the said Hicks.

18. Defendant further alleges that after the filing and location of the said scrip and the adjustment thereof to the said lands neither the Land Department of the United States nor any of its officers had any jurisdiction whatsoever to deal with said lands or to dispose of the same, or to throw them open to public entry by other persons or do any act in connection therewith, except it be to cause a patent therefor to issue for said lands to the said Orille Stram, and alleges the fact to be that by the terms of said grant and the said act of Congress, as hereinbefore set forth, and the practice of the department then in vogue, the title to said lands had actually passed to the said Orille Stram as effectually as tho' a patent in form had been issued therefor to the said Orille Stram, and that in truth and in fact the said Orille Stram and those claiming under her thereupon became the owners of the title to said lands, both legally and equitably, and alleges that the patent issued to the said Frank Hicks and the entry upon which said patent was issued were erroneously allowed, and the same were allowed and issued without warrant or authority of law, and that if it should be held that the said Hicks

and those claiming under him took any title whatsoever to said premises under said patent that at most it could be but the bare legal title thereto, held in trust for the benefit of the owners of the equitable title to said lands, and that this defendant and his codefendants as the owners of the equitable title to said premises are entitled to a conveyance of the legal title to said lands in question.

And this defendant further alleges that he has been in possession of said lands by and through his agents for the past fourteen years, and has claimed to own said lands during all of said time
327 under and by virtue of the said conveyances of said premises from the said Orille Stram to this defendant, the deeds of which conveyances have been of record in the office of the register of deeds in the county where said premises are located for more than thirteen years last past; and defendant further alleges that the said plaintiff and all other persons hereinbefore mentioned under whom it claims have at all times had knowledge of the rights, interest, and ownership of the defendants herein, and especially of this defendant, and that the said plaintiff has had knowledge of the possession of this defendant by and through his agents.

Wherefore this defendant prays the court;

1. That the plaintiff take nothing by this action.

2. That it be adjudged that the plaintiff has no right, title, or interest in or to said lands or any part thereof or lien thereon.

3. That it be adjudged, determined, and decreed that the defendant Frank W. Eaton is the owner of thirteen-thirty-sixths undivided interest in the premises described in the complaint, and that he is the owner of both the legal and equitable title thereto.

4. That it be adjudged, determined, and decreed that the title which the said Frank Hicks obtained by the issuance of the patent to him for said premises, as hereinbefore set forth, was the bare legal title, and that the said legal title has been *in* held in trust by the said Frank Hicks and the plaintiff herein claiming under him for *for* these defendants, and that the said plaintiff be adjudged, ordered, and decreed to convey all its right, title, and interest in said lands to these defendants in the proportions hereinbefore set forth, and that said decree be so made that in default of such conveyance the decree itself shall operate as a conveyance of said premises.

5. And for such other and further relief as to the court may seem just and proper in the premises.

328 Dated April 20th, 1899.

FRANK CUTTING AND
TOWNE & HARRIS,
Attorneys for Frank W. Eaton.

STATE OF MINNESOTA, } ss:
County of St. Louis, }

Frank W. Eaton, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has read the foregoing answer, and that the same is true of his own knowledge except as — thos- matters stated on information and belief, and as to those he believes them to be true.

FRANK W. EATON.

Subscribed and sworn to before me this 20th day of April, 1899.
L. C. HARRIS,
[SEAL.] *Notary Public.*

329 [Endorsed:] No. —. State of Minnesota, county of St. Louis. District court, eleventh judicial district. Midway Company, plaintiff, against Frank W. Eaton *et al.*, defendant-. Answer. Towne & Harris, attorneys for F. W. Eaton, Duluth, Minn. W. Ayres. P. H. Seymour.

330 EXHIBIT A.

DEPARTMENT OF INTERIOR,
WASHINGTON, *February 18th*, 1889.

HYDE AND MCDONALD
vs.
EATON AND STRAM.

Sioux Half-breed Scrip.

The Commissioner of the General Land Office.

SIR: I have considered the case of Thomas W. Hyde and Angus McDonald *vs.* Frank W. Eaton, as attorney-in-fact for Orillie Stram, *née* Moreau, on appeal by the latter from the decision of your office, dated August 4th, 1888, holding for cancellation Sioux half-breed scrip, Nos. 19 D and 19 E located and adjusted as follows:

Scrip No. 19 D upon lots 3, 5 and 6 and S. E. ¼ of N. W. ¼ sec. 30, and that numbered 19 E upon lots 1 and 2 and S. W. ¼ of N. E. ¼ and N. W. ¼ of S. E. ¼, same section, T. 63, N. R. 11, W., Duluth, Minnesota.

It appears that Frank W. Eaton as attorney-in-fact for said Orillie Stram, *née* Moreau, a Sioux half-breed Indian, filed in the Duluth, Minnesota, local land office, on June 16th, 1883, the scrip above
331 mentioned, and located the same on certain unsurveyed land, in amount three hundred and twenty acres, which locations were subsequently adjusted by the local office, and approved and posted by your office to embrace the tracts above described.

Said half-breed scrip bore date November 24th, 1856, and had been issued under the provisions of the act of July 17th, 1854 (10 Stat., 304), to the Sioux half-breed named above.

July 20th, 1885, Angus McDonald presented at the local office a pre-emption application for lot 2, and the N. ½ of the S. E. ¼ and S. W. ¼ of N. E. ¼ of said section 30, which that office rejected, because the N. E. ¼ of the S. E. ¼ was denominated swamp and overflowed land, and as to the residue of the tract, because the date of settlement as alleged in the application to file did not antedate the unadjusted scrip location No. 19 E, with which it conflicted.

On the same day (July 20th, 1885), Thomas W. Hyde applied to make pre-emption filing for lots 5 and 6 and S. E. ¼ of N. W. ¼ and N. E. ¼ of S. W. ¼ of the same section (30), which application the local office rejected, for the reason that the alleged date of settlement did not antedate the unadjusted scrip location, No. 19 D.

November 14th, 1885, a hearing was ordered by your office upon the application of McDonald and Hyde, who alleged "that the scripee never made any improvements whatever upon said land, either in person or by an agent or attorney, and that said land, at the date of the attempted locations, was unsurveyed and belonged to the class of land only locatable with such scrip after
332 the scripee shall have made improvements upon the same."

In support of the charges thus made was filed a copy of an affidavit (the original is now in the record), made October 9th, 1884, by the scripee, in which she denied ever having given to said Frank W. Eaton, either directly or indirectly, a power of attorney, or any authority of any kind to locate said scrip or to erect buildings and make improvements on the land in controversy, or upon any other land for her use and benefit.

In refutation of the denial made as above by the scripee, Eaton filed copies of two powers of attorney given him by said scripee and her husband, May 25th, 1883, conferring upon him the power and authority to locate said scrip, and to make the improvements, which under the act of 1854, were necessary before location could be made on unsurveyed lands; also to do any other act necessary to be done in the premises, in order to secure a permanent and *bona fide* location, in the same manner as if done by them personally.

The case proceeded to hearing, which was had April 6th, 1886.

The register and receiver, after reference to the denial by the scripee that she had ever constituted or appointed Frank W. Eaton her attorney-in-fact to locate the scrip or to make the improvements required for its location upon unsurveyed lands, also to the fact that her position up to date of hearing seemed to be that of one attempting to set aside powers of attorney wrongfully obtained from her; also to the endeavor of Hyde and McDonald on the day of the hearing to show that the scrip locations were illegal and that they
333 had *bona fide* pre-emption claims to the disputed tracts, found as follows:

1. The scrip in question was located upon unsurveyed lands on June 16th, 1883, more than one year before the pre-emptors settled, and was adjusted to the surveys July 21st, 1885, nearly one year after settlement by said pre-emption claimants.

2. The record contains duly executed powers of attorney from the scripee and her husband to F. W. Eaton, giving him the full power to do all acts necessary "to perfect and secure a permanent and *bona fide* location" of the scrip.

3. Eaton, under said authority employed another to go upon the land and make suitable improvements, giving directions what improvements to make and how to make them, which improvements were made for Eaton, and for the purpose claimed by him.

4. The scripee, in her complaint, while stating that she did not know Eaton and never authorized him to make improvements on these lands, admitted that she parted with the scrip and signed powers of attorney shortly before the location. She did not appear at the hearing to testify in support of the charges made by her.

5. She has never asked that the locations be cancelled and that the scrip be returned to her, but, on the contrary, she between the date of her complaint and the day of hearing did execute and deliver a deed of confirmation, acknowledging, ratifying and confirming all that had been done by Eaton as her attorney.

334 On these findings of fact, the local officers concluded that "there is nothing in evidence to show that this scripee was misled or imposed upon by the defendant or his agents, or to controvert the fact that the scrip locations were effected in strict conformity with the usual accepted practice in such cases, and in accordance with law and the rules of the Land Department."

They accordingly held, in effect, that contestants had failed to make a case, and that the scrip locations should stand.

From that action contestants Hyde and McDonald appealed to your office assigning six specifications of error, viz:

1. That register and receiver were without authority to decide the cause, and could only properly report the case with their opinion upon the facts to your office.

2. This so-called decision was contrary to the evidence.

3. It was contrary to law.

4. It treated the case as if the controversy was between the scripee and her attorney-in-fact, whereas it grew out of contest by third parties, who claim to have shown that the scrip was fraudulent on the part of both the scripee and her grantees.

5. The local officers in their so-called decision failed to pass upon the vital question in the case, viz: Whether the land contained improvements made by or under the personal supervision or direction of the scripee, and for her personal use and benefit.

6. They erred in finding that a confirmatory deed made between two of the parties to a fraudulent entry could bar the right of subseqent *bona fide* applicants.

335 Pending these proceedings on appeal, to wit: April 28th, 1887, Fred F. Huntress filed in the local land office applications to contest not alone the scrip locations, as your office seems to have assumed, but also the pre-emption claims of Hyde and McDonald. Said applications were by the local office transmitted to your office, which under date August 30, 1887, returned them to the local office, with instructions that they be held subject to the final disposition of the case at bar. They have since been returned to the department and are now in the record before me.

Your office decision, proceeding to a review of the facts disclosed by the record, found that accompanying the scrip and applications to locate the same were what purported to be the original powers of attorney, given May 25th, 1883, by the scripee and her husband, to Frank W. Eaton; that with each application was an affidavit by said Eaton, setting out that he under said powers of attorney had caused to be built upon each of the tracts upon which the scrip was located a house, fourteen by sixteen feet, one-story high, of timber, covered with split shingles, with doors and windows; that he also had cleared one-half acre of each tract, and that said improvements

were made under the personal direction of the scripee, and for her personal use and benefit.

Your said office decision farther recites that in the record are what purported to be original powers of attorney given by the scripee and her husband to Leonidas Merritt, granting him full power and authority to enter upon and take possession of any and all pieces or parcels of land in the State of Minnesota, which they
336 then owned or might thereafter acquire, or become interested in, by virtue of the location of the scrip in question; to prosecute and defend any suit at law in the courts of said State, and to grant, bargain, sell, demise, lease, convey, and confirm said land, or any part thereof, by deed, conveyance, demise or lease, in the same manner as if performed by them individually.

Your said office decision further recites that in the record are certified copies of two warranty deeds, dated July 2d, 1883, and executed by said Leonidas Merritt, in the name of the scripee and her husband, under and by virtue of the power of attorney above mentioned, conveying to Edward Byrne, James H. Powers and Joseph Clement, an undivided one-third interest in and to all the land embraced in said scrip locations and involved in this controversy, the consideration named in each being $25,000.00; that there are also in the case certified copies of two warranty deeds, bearing date July 6th, 1883, executed in the same manner by the same parties of the first part, conveying to Frank W. Eaton an undivided two-thirds interest in and to the same tracts of land, the consideration named in each being $25,000.00; that Joseph Clement, one of the grantees of an undivided one-third interest, above mentioned, on August 28th, 1883, as appears by certified copies of two deeds of warranty on file, conveyed to one Nicholas Lansterf his undivided one-ninth interest in and to said tracts, the consideration named in each being $250.00; that on the next day (August 29th, 1883), as shown by certified copies on file, James H. Powers, another of the grantees of an undivided one-third interest, executed two similar deeds
337 conveying to said Lansterf his undivided one-ninth interest in and to said tracts, the consideration named in each deed being $350.00.

Your office decision also mention- certain quitclaim deeds (certified copies of which are in the record), executed and given by the several parties (except Clement), who made the above-mentioned warranty deeds, the purpose of the quitclaim deeds being to correct imperfect descriptions in the prior warranty deeds, which together embrace all the land covered by the scrip locations.

As a result of the conveyances above recited, your office decision finds that such title as passed under said conveyance now rests as follows:

Two-ninths interest in Nicholas Lansterf by conveyance from Powers and Clement. One-ninth interest in Edward Byrne under original conveyance from Merritt, as attorney-in-fact for the scripee, with power to sell; two-thirds (six-ninths) interest in Frank W. Eaton, under conveyance from Merritt, as attorney-in-fact.

Your office then holds that "these several deeds of conveyance

and release conferred no greater title upon the grantees than the grantors had, which was simply a right to these tracts of land, subject to the final adjudication and approval of these locations."

It then makes reference to the fact disclosed by the record that prior to the hearing before the local office, to wit, on March 31st, 1886, the scripee and her husband joined in a deed of confirmation, ratifying and confirming all and singular the acts of Frank W. Eaton and Leonidas Merritt, relative to the tracts in question, done and performed by them under the respective powers of attorney, given as hereinbefore described.

338 Proceeding, then, to a consideration of the testimony taken at the hearing, your office decision finds that it "establishes by a clear preponderance the fact that said Eaton by virtue of his power of attorney employed Edward Byrne to make the improvements upon the respective tracts in question, and that Byrne secured the services of Powers and Clement to assist him in the matter," that Eaton admits that the power of attorney under which he acted was executed by the scripee in blank; that he never saw the scripee until March 31st, 1886, never saw the land, and did not know whether scripee ever saw it or not; that the deed of confirmation by the scripee appears, so far as she and Eaton are concerned, to remove any objection to the acts previously performed by the latter, under and by virtue of his said power of attorney; that the affidavits accompanying the location of said scrip appear to fulfill the requirements of the circular of May 28th, 1878 (5 C. L. O., 126).

This would seem on its face to point to an adjudication in favor of the scrip locations; but your office decision further proceeds to say that the only other question left to pass upon touching the legality to these locations, is, whether the power of attorney given by the scripee to Frank W. Eaton, by virtue of which he made the locations, could carry with it, under the law, the power and authority to make the improvements, which were necessary as a prerequisite to valid location on the scrip on unsurveyed land. On this question your office decision concludes, that since the evidence shows clearly that the scripee in this case never saw the land, or

339 the improvements, or had anything whatever to do therewith, and since the circular referred to, *supra*, requires that the Indian shall have a direct connection with the land, and claim the same for his or her personal use, the scrip locations are not valid and should be cancelled, as speculative and made with an evident intent to evade the law, rather than to comply in good faith with legal requirements.

Upon a careful examination of the entire record, I find the facts to be substantially as stated by your office decision and outlined herein.

Epitomized, they are as follows:

The scripee disposed of her scrip, surrendering possession thereof to some one now unknown. Said scrip was accompanied by two powers of attorney, executed in blank, one giving authority to some one not then named to locate the scrip; the other, giving a like authority to sell the land located upon. The scrip, after many years and

after passing through several hands, lodged in the hands of Frank W. Eaton, who thereupon filled up the blanks in the power of attorney to locate, inserting his own name as that of attorney-in-fact for such purpose. He employed others to make slight improvements on the lands in question (then unsurveyed) and after such improvements, which were scarcely deserving of the name, he located the scrip as attorney-in-fact for Orillie Stram, the scripee.

The blanks in the other power of attorney (that to sell) were filled up by inserting the name of Leonidas Merritt, who it appears was a business partner of said Frank W. Eaton, and said Merritt, as attorney-in-fact of the scripee, executed certain warranty deeds, transferring and passing title to the lands covered by the scrip
340 locations to certain parties therein named, it appearing that said parties were Eaton, who had made the locations, and three men, Edward Byrne, James H. Powers, and Joseph Clement, who had been by him, or through his agency, employed to make the improvements above mentioned.

Money consideration was expressed in said deeds, but it is apparent from the evidence that the real consideration, so far as Byrne, Powers and Clement were concerned, was what they had done in making the improvements. They got an undivided one-third interest. The residue went to Eaton.

The scripee never saw the land. At the date of the location she had never seen Eaton, who acted as her attorney-in-fact, and did not then know that there was such a person in existence. She had, as a matter of fact, sold the scrip long prior to the location, and had no personal interest in the land, nor were the improvements made for her personal use and benefit. It was a matter of no moment to her where the scrip was located, or whether it was located at all or not. Her actual interest in the matter ceased when she disposed of the scrip. It was admitted by her so-called attorneys-in-fact that she was to have no interest in the land. For a long time she directly and positively repudiated Eaton and Merritt as her attorneys-in-fact, denying that they acted for her in any capacity whatever. Afterwards and but a few days prior to the hearing, she ratified by deed what had been done by them.

This ratification, it is evident, was procured at the solicitation of Eaton or Merritt, or both, and for a consideration. But such
341 ratification does not change the fact that the improvements and location, though made under the guise of a power of attorney, were made, not under the direction and in the interest of the scripee, but for the benefit solely of another not even known to the scripee, viz: Eaton, who had inserted his name as attorney in the power executed in blank. If the location of the scrip was illegal and invalid, then the deed of ratification could not give it validity—could not vitalize that which originally had not in it the germ or essence of legal vitality.

This case is in all essential particulars like that of Joseph W. Allen, *et al.*, *vs.* Lewis Merrill, *et al.*, decided by me this day, 8 L. D., 207—review denied, 12 L. D., 138, so far as the method of making the scrip locations is a matter of concern, and the reasons of that

case are in this particular applicable to this. Following the ruling of that case, I must hold that the scrip locations here in question are invalid, and your office decision so holding is affirmed.

There remain for disposition the rights of Hyde and McDonald. It is asserted that the case is not in such a position that any determination ought to be made as to these claims, and that must be determined by a view of the record and proceedings taken.

It appears that on the 9th day of October, 1884, Hyde filed with the register a paper addressed to the register and receiver, in the caption described as being "An application for leave to contest the pretended entry, with Sioux half-breed certificate No. 19 E, for one hundred and sixty acres, issued to Orillie Moreau, on November 24th, 1856, and attempted to be located on the following-
342 described land, to wit: "Describing the land, and that in that application, after the allegation attacking the location, the following appears:

"That said contestant is a single man over 21 years of age, and has declared his intention to become a citizen of the United States, that he does not own 320 acres of land in any State or Territory, that he has not left land of his own in this State to reside on the public lands, and that he has never heretofore exercised his right under the pre-emption laws.

"That heretofore, to wit: on the 20th day of August, A. D. 1884, the said contestant made settlement on the said described land with a view to inhabiting and cultivating the same for his own exclusive use and benefit, and intends to make his declaratory statement for said lands under the pre-emption laws of the United States as soon as the surveyed plat of township 63, N. of range 11, W. of 4th P. M., shall be returned to the United States land office at Duluth, Minn.

"Wherefore your petitioner requests that this contest may be granted and a day set for the hearing thereof."

Attached to this application was an affidavit of verification, sworn to on the 29th of September, 1884.

This application is stated, in the Commissioner's order for a hearing, hereinafter mentioned, to have been transmitted by the register to the General Land Office October 31, 1884, and to have been supported by a copy of an affidavit of the scripee, which has been before spoken of.

On the 20th day of July, 1885, Hyde made application to
343 file the declaratory statement previously mentioned in this opinion, which was rejected, and thirty days allowed by the register for appeal. On the 25th day of August, 1885, the register transmitted Hyde's appeal from that decision, to the General Land Office.

All the proceedings on the part of McDonald in respect to the land claimed by him correspond exactly with those of Hyde as to the land claimed by him; and were made by the same attorneys, and at the same time respectively.

Afterwards, on the 14th of November, 1885, the Commissioner of the General Land Office, by letter "C" of that date, ordered a hear-

ing, in which, after reciting the allegations for and against the validity of the scrip, he proceeds:

"In view of the conflicting statements respecting the legality of these locations, I deem it proper that a hearing should be held, that the respective parties may have an opportunity to submit such proof as they may have in support of their allegations, and that this office may be possessed of all the facts possible in the matter; and the same is hereby ordered.

"You will notify all parties in interest of the time and place of hearing, and at the proper time thereafter you will transmit to this office the testimony taken thereat with your opinion thereon."

Under this order of the Commissioner, when the hearing came to be held, it seems to have been assumed by all parties that the rights of Hyde and McDonald as pre-emptors were involved; and voluminous testimony was taken, not only with respect to the rights of the locators but with respect to the rights of the pre-emptors.

344 Upon the conclusion of the hearing, the register and receiver, being of the opinion that the scrip locations were valid, disposed of the pre-emptor's claims as follows:

"The *bona fides* of Hyde and McDonald or their rights under the pre-emption law need not be considered here, as the question of their claims is contingent upon their ability to set aside the scrip locations, and thus render the land subject to pre-emption settlement.

Upon this showing of fact, we conclude that the contestants have failed to make out a case, and that the proceedings should be dismissed. It is so ordered."

The decision of the Assistant Commissioner makes no allusion to the contest in regard to Hyde and McDonald, simply reversing the decision of the local officers, as to the validity of the scrip location.

Upon examination of the testimony taken at the hearing the following appears in the examination of Hyde:

Q. Did you have any contract with Mr. White in writing or otherwise, by which he was to receive any compensation of interest in the land?

A. Yes, there was a contract.

Q. Where is it?

A. I don't know.

Q. When and where did you last see it?

A. I have not seen it since it was drawn up by Mr. White.

Q. What did it contain?

A. It contained that, when I proved up, I was to secure him a one-half interest.

McDonald testified as to the land covered by his pre-emption claim:

345 "Judge White has no interest in it. There is an understanding that he is to have an interest in it if we succeed in this trial; he is to have a half interest. * * * The arrangement with Hyde is the same as mine. White is to have half if we succeed in this. James H. Power is also to have an interest in it if we suc-

ceed. I don't know how much he is to get. I agreed to give him an interest if we succeeded in getting the land."

He further testified:

"Mr. White is paying the expenses of the claim with the understanding that he is to have half of it after we secure it."

Again—

"I am to let him have an interest in the land when I get it to pay for his time and services. The contract I have with Mr. White for his one-half is in writing."

When asked how he could give Mr. White a half interest, unless he should deed to him one-half, he answered: "I could not very well."

White, when put upon the stand, testified that after diligent search he was unable to find the contract.

Further evidence than that quoted from the testimony of Hyde and McDonald is unnecessary to show that they have, by the contracts which they admit having made, disqualified themselves from taking the land under the pre-emption law.

Counsel, in one of the briefs in the case, aver as to McDonald that the records of your office will show that he has already exhausted his pre-emption right by having made a pre-emption filing, and, having filed a formal relinquishment of this claim there-
346 under. I have not attempted to test the correctness of this averment by an inspection of the records of your office. It is deemed unnecessary in view of the testimony of Hyde and McDonald, the pre-emption claimants, as to their contract to sell.

The testimony of the two claimants establishes beyond question that the statements made in their application to contest, that their settlements were made wholly for their own use and benefit, was not well founded, and that it would be impossible for either of them to make the affidavit required by section 2262 R. S., "that he has not, directly or indirectly, made any agreement or contract, in any way or manner with any person whatever, by which the title which he might acquire from the Government of the United States should inure in whole or in part, to the benefit of any person except himself."

In view of this record and proof, it appears to be the duty of the department to dispose of these claims of pre-emption. A hearing has been had upon the validity of them, in which the evidence was adduced fully, and upon which the material facts appear to have been sufficiently elicited to leave no doubt. Whatever rights they might have established would, under a familiar rule of the department, have been regarded as fixed at the time when they made their application to file. Their application to file must be treated as if they had been allowed, subject to the rights of others, and it now appears that they ought to be cancelled, if filed. Their appeal (which is sent up in the record) from the rejection of their applications, appears to bring the whole matter before the department; and in the exercise of the power of supervision vested in the department by
347 law, it seems to be demanded that upon this disclosure of the facts the proper action should be taken. If there had been

no hearing upon this question, the proper action would be, upon a suggestion of such information, to direct a hearing to be had; but inasmuch as a hearing has been had and as the testimony which shows the absolute impossibility of perfecting a pre-emption title in these claimants has proceeded from themselves, testifying under oath, there appears no reason for directing a further hearing.

If their declaratory statements were now to be filed as of that date, the duty would rest on the department to cancel them, in accordance with the ordinary practice in such cases.

This leaves to be considered one other branch or feature of the case as now presented by the record. On April 28th, 1887, one Fred T. Huntress filed formal applications to contest the pre-emption claims of said Hyde and McDonald, respectively, his charge being that said claims were initiated not in good faith to appropriate the lands to their own exclusive use, but for speculative purposes, they having agreed to convey title to other parties when procured by them.

Huntress, in his affidavits of contest, asks that a hearing be ordered to enable him to substantiate by competent proof the charges made.

Counsel for Huntress, however, argues in a brief recently filed that further hearing is unnecessary, and that the asserted claims of Hyde and McDonald may properly be rejected and finally disposed of on the record as it now exists.

It is therefore asked that such action be taken and the
348 scrip locations, as well as the pre-emption claims of said Hyde and McDonald being disposed of and the record cleared of any claim to the land, that he (Huntress) be accorded the preferred right of entry on said lands.

Notwithstanding the foregoing judgment to some extent was anticipated by the petition, this proceeds on the record all of which had been made up before Huntress came into the case as a pretended contestant, and was in no way or manner aided by what he did. His acts had nothing whatever to do with bringing about the rejection of either the scrip claims or those of Hyde and McDonald. Besides, an application to file a declaratory statement is hardly subject to contest. He is, therefore, in no position to claim a preferred right of entry as a successful contestant, and his application to be so considered and treated must be denied. This disposes of all the claims, and asserted claims to the land, so far as disclosed by the record before me, and leaves the land in question open to disposal under the public land laws of the United States applicable thereto, and such is the judgment of this department.

The papers in the case are herewith returned.

Very respectfully, WM. F. VILAS, *Secretary.*

349 11930.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1900.

THE MIDWAY COMPANY, Appellant,
vs.
FRANK W. EATON ET AL., Respondents. } No. 150. Syllabus.

By virtue of the act of July 17, 1854—10 U. S. Statutes at Large, 304—there was issued to one Orillie Moreau, a mixed blood of the Sioux nation, five pieces of what is known as half-breed scrip, one of these pieces, for 160 acres, being described as No. 19 D.

This piece was located June 18, 1883, on unsurveyed lands in the Duluth district, by one Eaton, who held a power of attorney executed and delivered by the recipient of the scrip and her husband, she having married a man named Stram in the meantime, which power authorized Eaton to locate the scrip and to do all acts necessary to secure a permanent and *bona fide* location thereof. After the land was surveyed and on July 21, 1885, the location was adjusted at the local office to governmental subdivisions on the application of the attorney-in-fact In a case instituted by one Hyde, who claimed the land under the pre-emption act, the Commissioner of the General Land Office held the Stram entry unauthorized and invalid, and
that the same should be cancelled and set aside.

350 This decision was affirmed by the Secretary of the Interior Feb. 18, 1889. Hyde's claim was disposed of adversely to him at the same time. The land was subsequently patented by the U. S. to one Hicks under the homestead act, and Hicks' successors in interest brought this action to determine adverse claims against defendants, who assert ownership under the Stram entry. On findings of fact the court below held as conclusions of law that the plaintiff held the legal title to the land in trust for defendants in certain undivided shares, and that said defendants were and are the owners thereof, and ordered judgment accordingly.

Held, that the Secretary of the Interior acted without the authority of law when he decided the Stram entry or location to be unauthorized and invalid, and for that reason affirmed the order of the Commissioner cancelling the same.

Held, further, that the scripee or her successors in interest could not be deprived of their rights in the land by the assumption of a supervisory power by the officials in the Land Department or by the issuance of a patent to another.

Held, that the findings were supported by the evidence and justified the conclusions of law.

351 11980.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1900.

THE MIDWAY COMPANY, Appellant,
vs.
FRANK W. EATON ET AL., Respondents. } No. 150. Opinion.

Action to determine an adverse claim to three governmental subdivisions situated in St. Louis county. The court below found against plaintiff, the corporation, and ordered judgment in favor of the defendants as owners of undivided interests. The appeal is from an order denying a new trial and also from the judgment thereinafter entered. This case is another chapter of the controversy which has been in progress since 1883, in the courts and in the Interior Department of the General Government, over that well-known and very attractive section thirty. The particular tracts here involved were referred to in the case of Bishop Iron Co. *v.* Hyde, 66 Minn., 24, recently affirmed in the Supreme Court of the United States as those upon which had been located prior to the initiation of Hyde's claim, Sioux half-breed scrip No. 19 D., issued to a woman named Moreau, which location was contested by Hyde, as therein set forth, a contest which resulted disastrously to both parties, the Secretary of the Interior finally sustaining the decision of the Commissioner of the General Land Office that the scrip location should be cancelled for non-compliance with the law,
352 and that Hyde had no rights as a pre-emptor, because he had previously contracted to sell and convey to a third party a portion of the land he proposed to acquire. In 1898 the land in question, a part only of that covered by the Moreau scrip, was patented by the U. S., under the homestead act, to one Hicks, and the plaintiff's claim of title is derived from him. The defendants assert ownership through and under the scrip location, their position being that the same was unlawfully cancelled by the officials of the Land Department; that the scripee could not be deprived of rights obtained under the location or entry; that the patent subsequently issued to Hicks inured to the scripee's benefit, and that the former and the plaintiff, who purchased with notice, held the land in trust for defendant. It is this trust which the court below enforced through the judgment appealed from. As we regard the case, the rights of the respective parties rest upon the legality of the rulings in the Land Department, the last being the affirmance by the then Secretary of the Interior of the order of cancellation as made by the Commissioner of the General Land Office August 4, 1888. This affirmance bore date February 18, 1889, and is unpublished. It was sustained by the successor in office of said Secretary. See 12 Land Dec., 157. In the Hyde case much of the history of this contest in the department is related. The testimony was taken before the local land officers, who were of the opinion that the scrip entries were valid. Certified copies of the

testimony of the witnesses produced at this hearing were received in evidence in the court below. The written opinion of the local officers and the findings made by them, if any, were not there presented; nor was there introduced the findings of fact and conclusions of the Commissioner as they appeared, undoubtedly, in his decision of August 4, 1888; but parts or all of these findings were recited in the decision of affirmance made by the Secretary, of date February 18, 1889, a certified copy of the same having been received in evidence at the trial. From this copy and other testimony it appears that on June 18, 1883, one Eaton, as attorney-in-fact for the half-breed, who had in the meantime married a man named Stram, and who will hereinafter be called Mrs. Stram,
353 filed the scrip in question, with other pieces, upon tracts of unsurveyed land in the Duluth district. The necessary affidavits, with the powers of attorney and diagrams to locate and identify the tracts, were also filed. All of the steps required by the rules and regulations of the Land Department seem to have been taken in due form. July 21, 1885, upon the application of the attorney-in-fact, scrip No. 19 D was adjusted by the local officers to the governmental subdivisions herein involved, and other subdivisions, the land having been surveyed by the authorities just previously. The Hyde contest was commenced the day before. We now come to facts which from the decision of the Secretary it appears were found by the Commissioner in decision affirmed by the Secretary, as before stated.

1. That accompanying the scrip and application to locate the same were what purported to be the original power of attorney, given May 25th, 1883, by the scripee and her husband to Frank W. Eaton; that with the application was an affidavit by said Eaton, setting out that he under said power of attorney had caused to be built upon the tracts upon which the scrip was located a house 14 by 16 feet, one story high, of timber, covered with split shingles, with doors and windows; that he also had cleared one-half acre of land, and also setting forth:

2. That said improvements were made under the personal direction of the scripee and for her personal use and benefit.

3. It was found by a clear preponderance the fact that said Eaton, by virtue of his power of attorney, employed Edward Byrne to make the improvements upon the tracts in question, and that Byrne secured the services of Powers and Clement to assist him in the matter.

4. That Eaton admits that the power of attorney under which he acted was executed by the scripee in blank; that he never saw the scripee until March 31st, 1886; never saw the land, and did not know whether said scripee ever saw it or not; that the deed of confirmation by the scripee appears, so far as she and Eaton are
354 concerned, to remove any objection to the acts previously performed by the latter under and by virtue of his said power of attorney.

5. That in the record are what purport to be an original power of attorney given by the scripee and husband to Leonidas Merritt,

granting him full power and authority to enter upon and take possession of any and all pieces or parcels of land in the State of Minnesota which they owned or might thereafter acquire or become interested in by virtue of the location of the scrip in question, to prosecute and defend any suit at law in the courts of said State, and to grant, bargain, sell, demise, lease, convey, and confirm said land, or any part thereof, by deed, conveyance, demise, or lease, in the same manner as if performed by them individually.

6. That on March 31st, 1886, the scripee and her husband joined in a deed of confirmation ratifying and confirming all and singular the acts of Frank W. Eaton and Leonidas Merritt relative to the tracts in question done and performed by them under the respective powers of attorney given as hereinbefore described.

The decision contains further recitals of findings which appear to us to be of no value when passing upon the main question before us and we shall have no occasion to again refer to them except incidentally. The decision proceeds, after stating facts, as follows, the italics being our own:

"This would seem on its face to point to an adjudication in favor of the scrip locations, but your office decision further proceeds to say that the only other question left to pass upon touching the legality to these locations is, whether the power of attorney given by the scripee to Frank W. Eaton, by virtue of which he made the location, *could carry with it, under the law, the power and authority to make the improvements*, which were necessary as a prerequisite to valid location on the scrip on unsurveyed land. On this question your office decision concludes that since the evidence shows clearly that the scripee in this case never saw the land or the improvements or had anything whatever to do therewith, and since the *cir-*
355 *cular referred to supra requires that the Indians shall have a direct connection with the land, and claim the same for his or her personal use*, the scrip locations are not valid and should be cancelled as speculative and made with an evident intent to evade the law rather than to comply in good faith with legal requirements."

The circular referred to was one issued in 1864 by the Land Department to the local officers, in which the latter were advised that scrip could be located:

4th. "Upon any other unsurveyed land, not reserved by Government, upon which they have respectively made improvements."

5th. "When not located by the reservee in proper person, the application to locate must be accomplished by the affidavit of the agent that the reservee is living, and that the location is made for the sole use and benefit of said reservee.

The land selected in satisfaction of a certificate of scrip must of course be located in the name of the party in whose favor the scrip is issued, and the location may be made by him or her in person or by his or her guardian or duly authorized agent."

The Secretary then proceeds to consider the facts "epitomized," as he claims, making several statements which are not founded upon any evidence now before us, and then he characterizes the improvements as "scarcely deserving the name."

In all essential particulars, said the Secretary, the case is like that of Allen *v.* Merritt, decided by him on the same day—8th Land Dec., 207; review denied, 12 *ib.*, 108—and, following the ruling in that case, the Secretary held the location invalid. If, on the facts as found, the Secretary correctly interpreted and applied the law which governs in such cases, his decision must be upheld. But if there was error in the construction of the statute, the decision is of no binding force in this litigation. Before considering the law under which the scrip was located let us briefly refer to the facts found by the Commissioner of the General Land Office, according to the Secretary's decision. The contents of the affidavits as
356 to the extent of the improvements made by Eaton are recited and inferentially, at least, are found to be true.

These improvements consisted of a log house 14 by 16 feet in size, one story high, covered with split shingles, with a door and place for a window. Half an acre was cleared. This was done in June under direction of Eaton, who held a power of attorney executed by Mrs. Stram and her husband less than a month before, to locate this scrip and "to do all acts necessary to secure a permanent and *bona fide* location thereof." We are clearly of the opinion that from the Secretary's decision it appears that the Commissioner found these improvements to have been made prior to the location; and it also appears that the Commissioner found that they were made by persons employed by Eaton for the purpose and by virtue of his power of attorney, the question being, as stated by the Secretary, whether the power to locate carried with it, under the law, the authority to make the improvement required to be made upon the location of scrip on unsurveyed lands. As the scripee never saw the lands or the improvements, had no direct connection with the land, and never claimed the same for her own personal use, it was held that the location was invalid, and the cancellation seems to have followed as a consequence.

The law under which scrip was issued to the half-breeds or the mixed bloods of the Sioux nation was the act of July 17, 1854, 10 U. S. Statutes at Large, 304.

The act is not complicated and in some respects is quite indefinite, but it empowered and authorized the President to cause to be issued to certain mixed bloods certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the Pepin reservation among them *pro rata*. There was a provision that these certificates or scrip might be located upon the lands within the reservation or upon other unoccupied lands subject to pre-emption or to private sale—that is, lands which had been surveyed, and also upon unsurveyed lands not reserved by the Government, "upon which the applicants have respectively made improvements." There was a provision that these certificates or scrip should not embrace more than 640 nor less than 40 acres
357 each, and they were to be equally apportioned among those entitled. To ascertain who was entitled, reference must be had to the 9th article of the treaty of Prairie du Chien, of date July 15, 1830, sec. 7, U. S. Statutes at Large, 331, from which it will ap-

pear that in a very general manner the reserved or Pepin tract was bestowed upon the half-breeds of the Sioux nation, they to hold as all other Indian titles were held. Thereafter, and as empowered by the 1854 act, the President caused certificates or scrip to be issued to these mixed bloods indiscriminately and without reference to age, sex, or other conditions. The result was that old and young, adults and minors, male and female, those that had but little Indian blood in their veins and those in whom such blood greatly prevailed, were the recipients. And this fact is not to be ignored when discussing the correctness of the Secretary's views as found in his decision of February 8, 1889. Under the law there *was* issued to each one of 640 persons, Mrs. Stram being one of the 640, 5 pieces of scrip thus described: 1 A, 40 acres; 1 B, 40 acres; 1 C, 80 acres; 1 D, 160 acres; 1 E, 160 acres, a total of 480 acres each. To each one of 38 persons there was issued one piece of 40 acres and two for 160 acres, in all, 360 acres to each. And this is another fact to be kept in mind.

There was also another proviso in the act of July 17, 1854, "that no transfer or conveyance of any of said certificates or scrip shall be valid." It is clear that this is a positive and emphatic prohibition on the assignability of the certificate- or scrip, but it is not a prohibition upon a conveyance of the land upon which scrip had been located. As was said in Gilbert *v.* Thompson, 14 Minn., 514, "no restraint is imposed upon the right of property in the land after it is acquired by location of the scrip. In the scrip itself the half-breed had nothing which he could transfer to another, but his title to the land, when perfected under it, was as absolute as though acquired in any other way. It follows that any attempt to transfer the scrip, directly or indirectly, would be of no effect as a transfer. The title to the scrip would remain in him and the title to the land acquired by
it would remain in him, just as though no such attempt
358 had been made.

Such attempt to transfer would not involve any moral turpitude nor the breach of any legal duty, as is the case with an attempt to transfer a pre-emptive right. It would be simply ineffectual, because the scrip is not transferable."

Further considering the law, it is well to look at the construction placed upon it by the officers of the Interior Department soon after scrip was issued to the beneficiaries, a construction contemporaneous with the passage of the law. We find that immediately after its issuance a circular was promulgated by the Commissioner of the General Land Office for the information and guidance of the local officers, a clause of which read that locations might be made "upon any unsurveyed land, not reserved by Government, upon which they have respectively made improvements. Where the scrip may be located on unsurveyed lands outside the reservation on which the half-breed has made improvements and which is not reserved by the Government, his application for location should be accompanied by a diagram and description, denoting the natural objects and distances, so as to fix with certainty the exact locality wanted, which serves as the best notice in our power to settlers that conflict

may be avoided and enable you, when the surveys are made, to designate the subdivisions embracing the location."

1 Lester's Land Laws, 626.

We have discovered that it was required, not that the improvements upon unsurveyed lands must be of a reliable or permanent character or that they should be made by the scripee or under his personal direction, but that the application should be accompanied by a diagram and description, that the exact locality might be designated, and thus, in connection with the improvements upon the ground, conflicts might be avoided between claimants, and the locations more easily and certainly adjusted when surveys were actually made.

The making of improvements by or under the scripee's immediate direction was not made of prime importance by the Commissioner when preparing these instructions. The practice and custom
359 of making scrip entries was definitely understood and well settled in the 17 years which followed prior to the issuance of another circular in the year 1864, emanating from the same office and for a like purpose, and from this we have hereinbefore quoted. In this circular it was stated that where a half-breed for himself may make actual settlement his improvements will be notice on the ground to any other settler; and we are of the opinion that the purpose of this feature of the law, requiring improvements to be made where the scrip was located on unsurveyed lands, must have been that visible notice by work done on the ground might thereby be given to other persons of the scripee's prior right, and thus prevent collision and conflict. The language as to improvements was general and vague. None were required where surveyed lands were located, and it is very evident that this requirement was for a minor purpose. Obviously it was not the design of the law to compel actual settlement or residence upon the land, for had it been the language would have been plain and unambiguous. This purpose was accomplished wherever the improvements were of such a character as to be notice and their value or extent was of little consequence. That in this case they were ample as notice ought not to be questioned. The entire purpose of the act itself seems to have been to promote and secure an exchange of the interests of the mixed bloods in the reservation, which was becoming valuable for actual settlers, for certificates or scrip which would be available for the acquirement of title in fee to specific parcels of land there or elsewhere on the public domain. It was proposed to compensate the mixed bloods who surrendered their rights or claims under the treaty in a manner which would be of some value, and it has been held that the fact that the Government saw fit to make the scrip as such non-assignable does not operate to prevent the beneficiary from making an agreement before location or giving power to convey the land when the scrip shall have been located and the land entered.

We need not cite decisions in support of this proposition, for they are abundant, Federal and State, nor need we stop to consider why

Congress saw fit to declare that the scrip should not be as-
360 signable and yet failed to deprive the scripee of the power of alienation immediately after the location and in pursuance of a bargain previously made. It is enough to know that the prohibition related solely to assignments of the scrip itself. So that, as before stated, the question is, was the land validly appropriated by the location of the scrip in the name of Orillie Stram, to whom it had been issued with four other pieces, and the only invalidity found by the Commissioner of the General Land Office and the Secretary was that Mrs. Stram had not seen the land or improvements and did not have direct connection with either, and never claimed the same for her personal use. The rules and regulations of the Land Department had not been complied with, it was stated, and it was held that this was sufficient to justify the cancellation.

Under the decisions of the Land Department, as well as those of the courts, a scripee can empower another to do all things necessary as a condition precedent to a location and then to actually locate. The improvements were made under the direction of a duly authorized agent, and then the entry was made in the name of the scripee by the same agent or attorney-in-fact. Mrs. Stram did not complain of this entry and urge that her rights had been disregarded. Upon the other hand, she ratified and confirmed every act performed by her attorneys-in-fact by a properly executed deed, executed in March, 1886. Now, when we examine some of the provisions of the law we are led to ask, could it have been the intention that each person to whom certificates or scrip was issued should see the land, in person, upon which each piece was to be located, or should, in person, see the improvements or claim the same for personal use, or be directly—that is, personally—connected with either or both?

Under the law the President was authorized to do what was actually done, issue to each person entitled several pieces of scrip of different sizes or acreage. Was it expected that each of these persons should be personally connected with the several and separate improvements required to be made if all of the pieces were located on unsurveyed lands, and would have to claim the same for
361 personal use? Surely not. This law contemplated and there *was* actually issued several pieces of scrip to each of a large number of minors. Babes in arms were held to be entitled and to them scrip was issued, and in many cases located before the minors reached majority, as might reasonably be expected. With these facts before us can it be held that Congress thought or intended that these minors would be required by a construction of the law to personally supervise the selection of from three to five tracts of land on which to locate their pieces of scrip, or that they would have to be directly connected with each of these locations, or in case unsurveyed lands were desired they would have to claim the necessary improvements as their own? In other words, do not these facts indicate to a moral certainty that it never occurred to the members of Congress that the construction placed on this law by the Secretary would be given to it at any time, much less after thirty years of wholly different construction, and a construction also which received judicial

recognition and approval? See Gilbert *vs.* Thompson, *supra*; Hope *v.* Stone, 10 Minn., 141; Marks *v.* Dickson, 20 How., U. S., 551. We are confident that they do so indicate and that the requirements found in the circular of May 28, 1878, were not in accordance with the law, and were therefore unauthorized. The act itself never required that the improvements should be of a certain kind or value or that the scripee should be directly connected with the land. It quite conclusively appears to the contrary when we consider the facts before referred to unless we take the position that the legislative branch of the General Government intended to confer upon the mixed bloods in exchange for their interest in the reservation scrip which would be of no value unless the recipients made personal selections, were directly connected with the locations and improvements, and made claim to both for their own use and benefit.

It is urged that Eaton's entry amounted to an evasion of that part of the law which forbade an assignment of the scrip, the well-known rule being evoked that an act which cannot be done directly cannot be accomplished indirectly. But if an agent can be authorized by the scripee to do all acts that may be necessary as a condition
362 precedent to a location, and may also be authorized to carry the scrip to the land office and complete the entry, and this, it is well settled, may be done, why is not the prohibition evaded quite as completely as the Secretary claimed it was in this case? The evasion is in every case where a contract of sale is made or contemplated, if it is in one. Locations under such circumstances have been repeatedly, almost universally, upheld, the officials of the department declaring, however, that the scripee cannot assign the scrip, that the location must be in the name of the person to whom the same was issued, and that the patent must be so issued, but further holding that, as the power to alienate is unrestricted by the law, an agreement to sell is not a matter for determination in the Land Department. It seems very apparent that the effect and validity of such an agreement must be left to the arbitrament of the courts, and not to the decisions of the Government officials.

We have not discussed the point made by counsel that, as the method adopted by Mr. Eaton was in accord with the long-continued practice of the department, as set out in its circular of 1857, the action of the Commissioner and the Secretary should be set aside as unwarranted. We think it unnecessary; nor do we consider at length the further point that the location of July 21, 1885, after the lands had been surveyed and the plats returned, was a valid location, even if the earlier one was invalid for the reasons assigned by the officials. It is true that the Hyde claim was the only one intervening when this scrip was adjusted or again located; and that claim was corrupt and invalid, as has been finally determined; so when the application of July 21 was made there was no valid existing adverse right which had attached and which stood in the way of a location of the scrip as upon surveyed lands, no improvements being necessary. There was no forfeiture of the scrip by the previous attempt to locate. If invalid, it was nothing but an attempt. No moral turpitude or breach of any legal duty was involved in the first location. If

Mr. Eaton, as the agent, had there expressed a desire to withdraw and relinquish all rights acquired previously and to lay
363 that particular piece of scrip on the land in question, as of that day, would not his right so to do seem unquestionable? And would not the obligation of the local officers to permit this act to be done appear to be beyond doubt? If this be true, why was not the legal effect of the adjustment a location of the scrip upon surveyed lands, there being no valid claim or right intervening and in conflict? The application then made was sufficient in form for an original location. If the scripee, Mrs. Stram, either in person or by agent, could that day have successfully applied for the land had she never made any previous attempt to obtain it, why should the application be rejected? Surely not on the ground that she had tried before and failed while the land was unsurveyed. Our conclusion is that upon the facts as found, hereinbefore stated, the Commissioner of the General Land Office and the Secretary of the Interior erroneously construed the law and imposed unwarranted conditions. The decision of the latter appears to have been predicated upon a circular of instructions, not upon a statute. It was error to hold that under the act in question it was vital that the scripee should see the land or the improvements prior to the entry, and that an agent could not act in her behalf when duly authorized not only in selecting the land itself, but in making such improvements as would in themselves and without regard to their value be notice on the ground of the assertion of a prior right. It was error to hold that the scripee had nothing to do with these improvements, for she had empowered an attorney-in-fact to make them. It was error to hold that the scripee must have direct connection with the land; and if, by his decision that the scripee must claim the land for her own personal use, the Secretary meant that such claim must be formally made or made in good faith or must be established by proof other than or different from that before the Land Department in this particular case, he was in error. There was not even an intimation in the law that the scripee should personally inspect or select the land or should make in person or even examine the improvements. Scrip was issued in from three to five separate and distinct pieces and of different
364 acreage. It was issued to persons who were old and decrepid, physically and permanently incapable of complying with the requirements established by the Secretary. Was the fact that they were old and disabled to be used to their injury, and were they to have nothing but unavailable pieces of paper? Certificates of scrip were issued to infants who would not reach a suitable age for obeying the behests of the land officials for a score of years. Were they expected to act through guardians or other agents and have some benefit of the provisions of the law, or were they expected to wait until majority came to them, and then to comply with the circular requirements? No distinction or discrimination was made in the law between the adult and the minor, — department could impose none by requiring less of the minor making a location than of the adult; nor did the law require that the land on which the scrip

was located must be selected by the mixed bloods for personal use, or even that a claim of this kind should be made. In fact, as we have seen, the inference to be drawn from its language and from what was done at and about the time is to the contrary, and the Secretary erred in holding, upon the facts as found, that the scripee had no interest whatever in the location made by her attorney-in-fact. Such a holding is, in effect, deciding that every piece of scrip issued to the mixed bloods which cannot be used by the recipient for his or her own personal benefit and for the acquirement of land for his or her own personal use could not be used at all and was of no value.

Finally, we hold that on the facts and the law the location in behalf of Mrs. Stram was proper and valid. It was error on the part of the officials of the Land Department to cancel the location and entry. Mrs. Stram or her successors in interest could not be deprived of her rights in the land by the assumption of a supervisory power by these officials or by the issuance, under their direction, of a patent to another person. The act of July 17, 1854, did not provide for the issuance of a patent, and the title to the property passed to Orillie Stram, *née* Moreau, by virtue of the location. The findings of fact justified the conclusions of law in the court below, and the judgment is affirmed.

COLLINS, *J.*

365 12016.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1900.

THE MIDWAY CO., Substituted for THE GERMANIA IRON CO., Appellant,
vs.
FRANK W. EATON ET AL., Def'ts; FRANK W. EATON *et al.*, Respondents.
} No. 213. Opinion.

Per Curiam:

All questions involved in this case are disposed of in Midway Co. *v.* same defendants. Opinion filed herewith.

Judgment affirmed.

366 [Endorsed:] Supreme court, State of Minnesota. The Midway Company, appellant, *vs.* Frank W. Eaton *et al.*, respondent. Opinion and syllabus. Filed May 16th, 1900. D. F. Reese, clerk. April term, A. D. 1900. Collins, judge.

367 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1900.

THE MIDWAY COMPANY, Appellant,
vs.
FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. Clark, Richard H. Fagan, and Margaretha Lonstorf, Respondents. } No. 150.

Pursuant to an order of court, duly made and entered in this cause on the twenty-ninth day of May, A. D. 1900, it is here and hereby determined and adjudged that the judgment of the court below herein appealed from, to wit, the district court of the eleventh judicial district, sitting within and for the county of St. Louis, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the respondents above named do have and recover of said The Midway Company, appellant herein, the sum and amount of two hundred and sixty-four and $\frac{40}{100}$ dollars ($264.40), costs and disbursements in this cause in this court, and that said respondents have execution for the enforcement thereof.

Dated and signed this 29th day of May, A. D. 1900.

By the court.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25.00
Clerk's fees for making return	
Printer's fees	228.00
Clerk's fees, supreme court	11.40
Filing mandate	
Affidavits and acknowledgments	
Postage	
	$264.40

368 [Endorsed:] 11980. State of Minnesota, supreme court. Transcript of judgment. Filed May 29, A. D. 1900. D. F. Reese, clerk.

STATE OF MINNESOTA, *Supreme Court,* } ss:

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 29th day of May, A. D. 1900.

D. F. REESE, *Clerk.*

369 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1900.

THE MIDWAY COMPANY, Appellant,
vs.
FRANK W. EATON, LEONIDAS MERRITT, Merrill M. Clark, Richard H. Fagan, and Margaretha Lonstorf, Respondents.

No. 150. Appeal from District Court, Eleventh Judicial District, County of St. Louis.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1900, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below herein appealed from be, and the same hereby is, in all things affirmed, and that the respondents above named have judgment accordingly.

Entered May 29th, A. D. 1900.

By the court.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: D. F. REESE, *Clerk.*

370 [Endorsed:] No. 11980. State of Minnesota, supreme court. Copy of order for judgment. Filed May 29, A. D. 1900. D. F. Reese, clerk.

371 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1900.

WEDNESDAY MORNING, 9.30 O'CLOCK, *April 25th, A. D.* 1900.

Court convened pursuant to adjournment, all the justices being present.

THE MIDWAY COMPANY, Appellant,
vs.
FRANK W. EATON ET AL., Respondents.

Cal. No., 150; Reg. No., 11980.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision, and taken under advisement.

A true record.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: D. F. REESE, *Clerk.*

[Endorsed:] 11980. State of Minnesota, supreme court. Copy of minutes of argument. Filed May 29, A. D. 1900. D. F. Reese, clerk.

372 [Endorsed:] No. 11980. State of Minnesota, supreme court. The Midway Company, appellant, against Frank W. Eaton *et al.*, respondents. Judgment-roll. Filed May 29, 1900. D. F. Reese, clerk.

373 STATE OF MINNESOTA:

Supreme Court.

STATE OF MINNESOTA, } ss:
Office of Clerk of Supreme Court, }

I, Darius F. Reese, clerk of the supreme court of the State of Minnesota, do hereby certify and return to the Supreme Court of the United States that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment, judgment-roll, and all of the proceedings had in the said supreme court of the State of Minnesota in the case between The Midway Company, appellant and plaintiff in error, against Frank W. Eaton, Leonidas Merritt, Merrill M. Clark, Richard H. Fagan, and Margaretha Lonstorf, respondents and defendants in error, including the opinion of the said supreme court therein, as appears from the original files and records of said supreme court of the State of Minnesota.

And I do further certify and return that I have annexed to said transcript and included therewith a copy of the petition for writ of error and of the bond on the writ of error and approval thereof and the assignments of error as the same remain on file and of record in said supreme court of the State of Minnesota, and the original writ of error from the Supreme Court of the United States and the original citation issued thereon, with admission of service thereof, and that the foregoing constitutes a true and complete return to said writ of error.

In witness whereof I have hereunto set my hand and seal of said supreme court of the State of Minnesota, at the capitol, at Saint Paul, Minnesota, this 6th day of June, A. D. 1900.

[Seal of the Supreme Court, State of Minnesota.]

DARIUS F. REESE,
Clerk of the Supreme Court of the State of Minnesota.

374 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1900.

THE MIDWAY COMPANY, Plaintiff in Error,
vs.
FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, Richard H. Fagan, and Margaretha Lonstorf, Respondents.

To the honorable chief justice of the supreme court of the State of Minnesota:

The petition of the Midway Company respectfully shows that on the 29th day of May, A. D. 1900, the supreme court of the State of Minnesota rendered a judgment against your petitioner in a certain cause wherein your petitioner, The Midway Company, was plaintiff and appellant and the said Frank W. Eaton, Leonidas Merritt, Merrill M. Clark, Richard H. Fagan, and Margaretha Lonstorf were defendants and respondents, as will appear by reference to the record and proceedings in said cause; that said supreme court of the State of Minnesota is the highest court of said State in which a decision in said suit could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error, under the statute of the United States, to wit, sec. 709 of the Revised Statutes of the United States, because in said suit and said judgment of the supreme court of the State of Minnesota there was drawn in question the validity of an authority exercised under the United
375 States and the decision of the said supreme court of the State of Minnesota was against the validity of said authority, and because in said suit your petitioner claimed title under a statute of the United States and the decision of the supreme court of the State of Minnesota in said suit was against the title of your petitioner claimed under said statute, all of which appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore your petitioner prays the allowance of a writ of error, returnable into the Supreme Court of the United States, and for citation and supersedeas; and he will ever pray, etc.

THE MIDWAY COMPANY, *Petitioner.*
WALTER AYERS,
Attorney for Petitioner,
208–209 *First National Bank Building, Duluth, Minnesota.*

STATE OF MINNESOTA, } ss:
County of St. Louis, }

Walter Ayers, being duly sworn, upon oath deposes and says that he is attorney for the petitioner named in the foregoing contention, and that the contents thereof are true of his own knowledge.

WALTER AYERS.

Subscribed and sworn to before me this 2d day of June, A. D. 1900.

H. A. DANEER,

[NOTARIAL SEAL.] *Notary Public, St. Louis County, Minnesota.*

376 [Endorsed:] 11980. State of Minnesota, supreme court, October term, A. D. 1900. The Midway Company, plaintiff in error, *vs.* Frank W. Eaton *et al.*, respondents. Petition for writ of error to U. S. Supreme Court. —— ——, attorney for plaintiff in error, 308–309 1st Nat'l Bank b'ld'g, Duluth, Minnesota.
Endorsed: Filed Jun- 4, 1900. Darius F. Reese, clerk.

377 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1900.

THE MIDWAY COMPANY, Plaintiff in Error,
vs.
FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, Richard H. Fagan, and Margaretha Lonstorf, Respondents.

Order.

Upon motion of Walter Ayers, Esq., attorney for appellant, and upon filing a petition for a writ of error and an assignment of errors—

It is ordered that a writ of error be, and hereby is, allowed, to have reviewed in the Supreme Court of the United States the judgment heretofore entered in the above-entitled cause, and that the amount of the bond on said writ of error be, and the same is hereby, fixed at one thousand dollars ($1,000.00), the same to operate as a supersedeas.

Dated June 4th, A. D. 1900.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

378 [Endorsed:] 11980. State of Minnesota, supreme court, October term, A. D. 1900. The Midway Company, plaintiff in error, *vs.* Frank W. Eaton *et al.*, defendants in error. Order allowing writ of error. —— ——, attorney for plaintiff in error, 308–309 1st Nat'l Bank bldg., Duluth, Minnesota.
Endorsed: Filed Jun- 4, 1900. Darius F. Reese, clerk.

379 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Minnesota, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in

the said suit between The Midway Company, appellant and plaintiff in error, and Frank W. Eaton, Leonidas Merritt, Merrill M. Clark, Richard H. Fagan, and Margaretha Lonstorf, respondents and defendants in error, wherein was drawn in question the validity of an authority exercised under the United States and the decision was against its validity, and wherein was drawn in question the construction of a statute of the United States and the decision was against the right and title specially set up or claimed under such statute, a manifest error hath happened, to the great damage of said The Midway Company, plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in the said Supreme Court, at Washington, on the third day of July next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

380

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the fourth day of June, in the year of our Lord one thousand nine hundred.

[Seal U. S. Circuit Court, Third Division, Dist. of Minnesota.]

HENRY D. LANG,
Clerk of U. S. Circuit Court for the District of Minnesota.

Allowed (to operate as a supersedeas).

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

381 [Endorsed:] O K. 11980, original. Supreme court of the United States. The Midway Company, plaintiff in error, *vs.* Frank W. Eaton *et al.*, defendants in error. Writ of error. ——, attorney for plaintiff in error, 308–309 1st Nat'l Bank bldg., Duluth, Minnesota.

Endorsed: Filed Jun- 4, 1900. Darius F. Reese, clerk.

382 UNITED STATES OF AMERICA, *ss:*

To Frank W. Eaton, Leonidas Merritt, Merrill M. Clark, Richard H. Fagan, and Margaretha Lonstorf, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein The Midway Company is the plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment ren-

dered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this fourth day of June, in the year of our Lord nineteen hundred.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

Service of the within citation and receipt of a copy thereof admitted this 5th day of June, 1900.

J. L. WASHBURN &
W. D. BAILEY,
Attorneys for Leonidas Merritt, Merrill M. Clark, and Richard H. Fagan, Defendants in Error and Respondents in Lower Court.

TOWNE & HARRIS,
L. C. HARRIS &
F. H. CUTTING,
Attorneys for Frank W. Eaton in Lower Court.

TOWNE & HARRIS,
PHELPS & McCLINTOCK &
WM. B. PHELPS,
Attorney for Margaretha Lonstorf in Lower Court.

383 [Endorsed:] 11980, original. Supreme Court of the United States. The Midway Company, plaintiff in error, *vs.* Frank W. Eaton *et al.*, defendants in error. Citation. —— ——, attorney for plaintiff in error.

Endorsed: Filed Jun- 4, 1900. Darius F. Reese, clerk.

384 STATE OF MINNESOTA, }
Department of Insurance. }

ST. PAUL, MINN., *June 4th*, 1900.

I, J. A. O'Shaughnessy, insurance commissioner of the State of Minnesota, do hereby certify that the Fidelity and Deposit Company of Maryland is a corporation organized under the laws of the State of ——, and is authorized under its charter to guarantee fidelity of persons holding places of public or private trust; to guarantee the performance of contracts other than insurance policies, and to execute and guarantee bonds and undertakings required or permitted in actions and proceedings at law; that it appears to my satisfaction, from sufficient evidence on file in my office of commissioner of insurance of said State of Minnesota, that said corporation, the Fidelity and Deposit Company of Maryland, has furnished the same security which is required by law and the regulations of my department of life insurance companies, under the provisions of sections 355 to 358, inclusive, of chapter 34, General Laws of the State of Minnesota of one thousand eight hundred and seventy-eight (1878).

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal of Ins. Dep'tm't of Minnesota.]

J. A. O'SHAUGHNESSY,
Insurance Commissioner.

385 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1900.

[Cancelled int. rev. stamp, five cents.]

THE MIDWAY COMPANY, Appellant,
vs.
FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, Richard H. Fagan, and Margaretha Lonstorf, Respondents.

Know all men by these presents that we, The Midway Company a corporation, as principal, and Fidelity and Deposit Company of Maryland, a corporation organized under the laws of Maryland, as surety, are held and firmly bound unto Frank W. Eaton, Leonidas Merritt, Merrill M. Clark, Richard H. Fagan, and Margaretha Lonstorf in the full and just sum of one thousand dollars ($1,000.00), to be paid to the said Frank W. Eaton, Leonidas Merritt, Merrill M. Clark, Richard H. Fagan, and Margaretha Lonstorf, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 29th day of May, in the year of our Lord nineteen hundred.

Whereas lately, at a session of the supreme court of the State of Minnesota, in a suit pending in said court between The Midway Company, plaintiff and appellant, and Frank W. Eaton, Leonidas Merritt, Merrill M. Clark, Richard H. Fagan, and Margaretha Lonstorf, defendants and respondents, a final judgment was rendered against the said plaintiff and appellant, and said plaintiff and appellant, The Midway Company, having obtained the al-
386 lowance of a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the foregoing suit, and a citation, directed to said Frank W. Eaton, Leonidas Merritt, Merrill M. Clark, Richard H. Fagan, and Margaretha Lonstorf, citing and admonishing them to be and appear at the Supreme Court of the United States, at Washington, within thrity (30) days from the date hereof:

Now, therefore, the condition of the above obligation is such that if the said The Midway Company shall prosecute its said writ of error to effect and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

In witness whereof the said The Midway Company has caused these presents to be signed by its president and its corporate seal to

be affixed, and the said Fidelity and Deposit Company of Maryland has caused these presents to be signed by a member of the local board of directors of Duluth, Minnesota, and its corporate seal to be hereto affixed the day and year aforesaid.

THE MIDWAY COMPANY,
By ANDREAS M. MILLER, *President.*

[Corporate Seal.]

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By HENRY S. MAHON,
A Member of the Local Board of Directors for Duluth, Minnesota.

[Corporate Seal.]

Attest: ROSS L. MAHON, *Agent.*

Signed, sealed, and delivered in presence of—
REID P. LENHE,
JEROME BERNHEIMER,
As to Midway Company.

A. L. AGATIN,
J. LANETOL,
As to surety.

STATE OF NEW YORK, } ss:
County of New York, }

On this 29th day of May, A. D. 1900, before me, a notary public within and for said county, personally appeared Andreas N. Miller, who, being by me first duly sworn, deposes and says that he is the president of The Midway Company, a corporation, and one of the obligors in the foregoing document; that the seal affixed to
387 the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its board of directors, and the said Andreas M. Miller acknowledged the same to be the free act and deed of said corporation.

[NOTARIAL SEAL.]

REID P. LENHE,
Notary Public, N. Y. Co., #24.

STATE OF MINNESOTA, } ss:
County of St. Louis, }

On this 1st day of June, A. D. 1900, before me, a notary public, personally appeared Henry S. Mahon, who, being by me duly sworn, deposes and says that he is a member of the local board of directors for Minnesota of the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of Maryland; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its board of

directors, and the said Henry S. Mahon acknowledges the said instrument to be the free act and deed of the said corporation.

[NOTARIAL SEAL.] A. L. AGATIN,
Notary Public, St. Louis Co., Minn.

388 [Endorsed:] 11980. State of Minnesota, supreme court, April term, A. D. 1900. The Midway Company, appellant, *vs.* Frank W. Eaton *et al.*, respondents. Bond on writ of error to Supreme Court of U. S. I approve of the within bond and the sufficiency of the surety thereon. Dated June 4, 1900. Chas. M. Start, chief justice supreme court, State of Minnesota. —— ——, attorney for appellant, 308–309 First Nat'l Bank building, Duluth, Minn.

Endorsed: Filed Jun- 4, 1900. Darius F. Reese, clerk.

389 Supreme Court of the United States.

THE MIDWAY COMPANY, Plaintiff in Error and Appellant,
vs.
FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, Richard H. Fagan, and Margaretha Lonstorf, Respondents and Defendants in Error.

Comes now The Midway Company, plaintiff in error, by its counsel, and respectfully represents that it feels itself aggrieved by the proceedings and judgment of the supreme court of the State of Minnesota in the above-entitled cause and assigns error thereto as follows:

1. The court erred in holding that the Land Department of the United States had no authority to cancel the locations of the Sioux half-breed scrip issued under the act of Congress approved July 17th, 1854, and under which locations the defendants in error claim title.

2. The court erred in holding that the plaintiff in error holds the title derived under the patent issued by the United States for the premises in controversy in said action in trust for the defendants in error.

3. The court erred in holding that the defendants in error were and are the owners of the premises in controversy in said action.

4. The court erred in holding that the findings of fact of the court below justified its conclusions of law.

390 5. The court erred in holding that the title to the premises in controversy in this action passed to Orillie Stram, *née* Moreau, by virtue of the location of Sioux half-breed scrip under which the defendants in error claim title.

6. The court erred in not holding that the findings of fact of the Secretary of the Interior set forth and embodied in his decision of February 18th, 1889, were final and conclusive.

7. The court erred in not holding that the findings of fact of the Secretary of the Interior set forth and embodied in his decision of February 18th, 1889, were sufficient to warrant and sustain the action of the Land Department of the United States in cancelling

the Sioux half-breed scrip locations under which the defendants in error claim title.

8. The court erred in affirming the judgment of the court below.

9. The court erred in not reversing the judgment of the court below and directing judgment for the plaintiff in error and against the defendants in error, as prayed in its complaint.

Wherefore the said The Midway Company (substituted for the Germania Iron Company), plaintiff in error, prays the honorable court to examine and correct the errors assigned, and for a reversal of the judgment of the supreme court of the State of Minnesota entered in the above-entitled cause.

THE MIDWAY COMPANY (SUBSTITUTED FOR THE GERMANIA IRON COMPANY),
Plaintiff in Error,

By WALTER AYERS, *Its Attorney.*

391 [Endorsed:] 11980, original. Supreme Court of the United States. The Midway Company, plaintiff in error, *vs.* Frank W. Eaton *et al.*, defendant- in error. Assignment of errors. ——, attorney for plaintiff in error.

392 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1900.

THE MIDWAY COMPANY, Appellant,
vs.
FRANK W. EATON, LEONIDAS MERRITT, RICHARD H. FAGAN, and Merrill M. Clark, Respondents.

Assignments of Error.

1. So much of the second finding of fact as finds that the defendant Frank W. Eaton had, prior to the attempted location of said scrip, been duly empowered by Orillie Stram as her attorney-in-fact for the purpose of locating said scrip is not sustained by the evidence.

2. So much of the third finding of fact as finds that the scrip therein referred to was adjusted upon the premises therein described upon application of the said Orillie Stram is not sustained by the evidence.

393 3. So much of the third finding of fact as finds that said certificates of scrip were duly located upon said surveyed lands and the said lands as surveyed lands were taken and appropriated under and by virtue of said scrip is not sustained by the evidence.

4. So much of the third finding of fact as finds that at the time of the adjustment of said scrip referred to in said finding that there were not, nor were there at the time when said scrip was located on said unsurveyed lands, nor at any other time, any valid adverse claims to said lands is not sustained by the evidence.

5. The court erred in making so much of the fifth finding of fact

as purports to state the reasons of the Secretary of the Interior for the decision therein referred to, because the reasons as so stated by the court are at variance with the said decision itself, which is made a part of the findings, and are not sustained by the evidence.

5½. So much of the tenth finding of fact as finds "that the improvements caused to be erected by the said Frank W. Eaton upon the said premises consisted of a house about 14 x 16 feet in size," in so far as the same in anywise contradicts or modifies the findings of the Secretary of the Interior in his decision of February 18, 1889, is not sustained by the evidence.

6. So much of the tenth finding of fact as found that it did not appear from the evidence before the Secretary of the Interior that the scrip referred to in the decision of said Secretary had passed through many hands or through any hands before coming into the hands of the said Frank W. Eaton is not sustained by the evidence.

7. So much of the tenth finding of fact as found that it appeared from the evidence before the Secretary of the Interior that
394 the powers of attorney to said Frank W. Eaton were executed by the said Stram about one week before the location of the said scrip by the said Frank W. Eaton is not sustained by the evidence.

8. So much of the tenth finding of fact as found that it did not appear from the evidence before the Secretary of the Interior that the said scripee never saw the lands is not sustained by the evidence.

9. So much of the tenth finding of fact as found that it did not appear from the evidence before the Secretary of the Interior that the scripee had sold the said scrip long prior to the location thereof is not sustained *in* the evidence.

10. So much of the tenth finding of fact as found that it did not appear from the evidence before the said Secretary that for a long time the scripee directly and positively repudiated Eaton & Merritt as her attorneys-in-fact, denying that they acted for her in any capacity whatever, is not sustained by the evidence.

11. The court erred in its first conclusion of law.

12. The court erred in its second conclusion of law.

13. The court erred in its third conclusion of law.

14. The court erred in its fourth conclusion of law.

15. The court erred in denying the plaintiff's motion for a
395 new trial, made upon the ground that its said decision was not justified by the evidence.

16. The court erred in denying the plaintiff's motion for a new trial, made upon the ground that its said decision was contrary to law.

17. The judgment appealed from is in all respects erroneous and not warranted by the facts found, and the same should be reversed and judgment directed in favor of the appellant and against the respondents, as prayed for in the complaint.

396 In the Supreme Court of the United States.

THE MIDWAY COMPANY, Plaintiff in Error,
vs.
FRANK W. EATON ET AL., Respondents. } # 312. O. T., 1900.

Stipulation.

It is stipulated in the above-entitled cause that the answer of Frank W. Eaton, referred to, but not printed, at the top of page 34 of the printed record in the court below, may be printed in full in the record in the Supreme Court of the United States, at the end thereof or at such other place in such record as may be most convenient for the clerk of said Supreme Court of the United States.

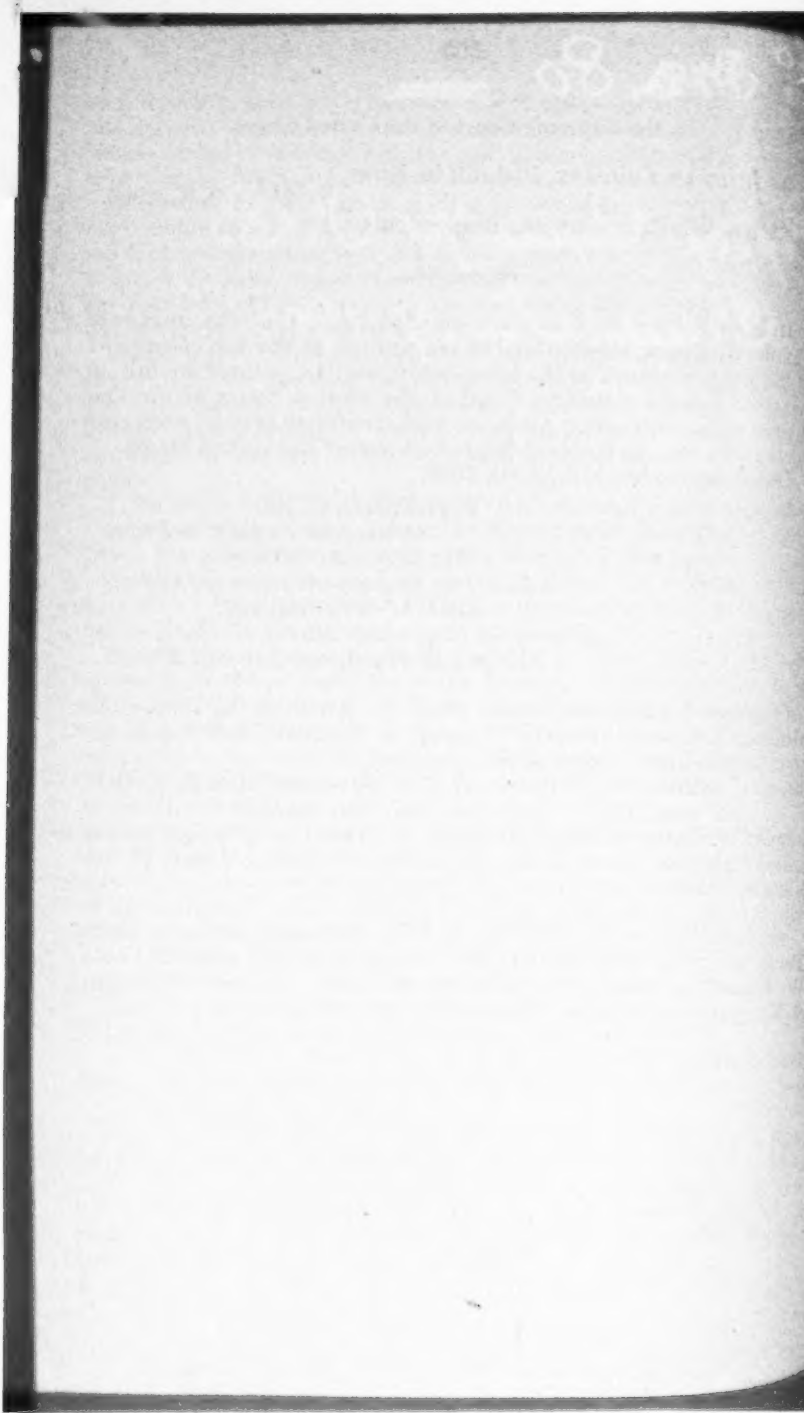
Dated September 11th, A. D. 1900.

WALTER AYERS,
Attorney for Plaintiff in Error.
CHARLES A. TOWNE,
Attorney for Respondents Eaton & Lonstorf.
JED. L. WASHBURN,
Attorney for Respondents Merritt M. Clark, Richard H. Fagan, and Leonidas Merritt.

[Endorsed:] Supreme Court of U. S. # 312, O. T., 1900. The Midway Company, plaintiff in error, *vs.* Frank W. Eaton *et al.*, respondents. Stipulation. Original.

397 [Endorsed:] File No., 17,797. Supreme Court U. S., October term, 1900. Term No., 312. The Midway Co., P. E., *vs.* Frank W. Eaton *et al.* Stipulation in regard to printing record. Office Supreme Court U. S. Filed Sep. 14, 1900. James H. McKenney, clerk.

Endorsed on cover: File No., 17,797. Minnesota supreme court. Term No., 312. The Midway Company, plaintiff in error, *vs.* Frank W. Eaton, Leonidas Merritt, Merrill M. Clark, Richard H. Fagan, & Margaretha Lonstorf. Filed June 11th, 1900.



No. 892. 80

FILED
NOV 9 1900
JAMES H. McKENNEY,
Clerk.

Supreme Court of United States.

Brf. of Ayers for P. E.

Filed Nov. 9, 1900.

OCTOBER, A. D. 1900, TERM.

THE MIDWAY COMPANY, Plaintiff in Error,

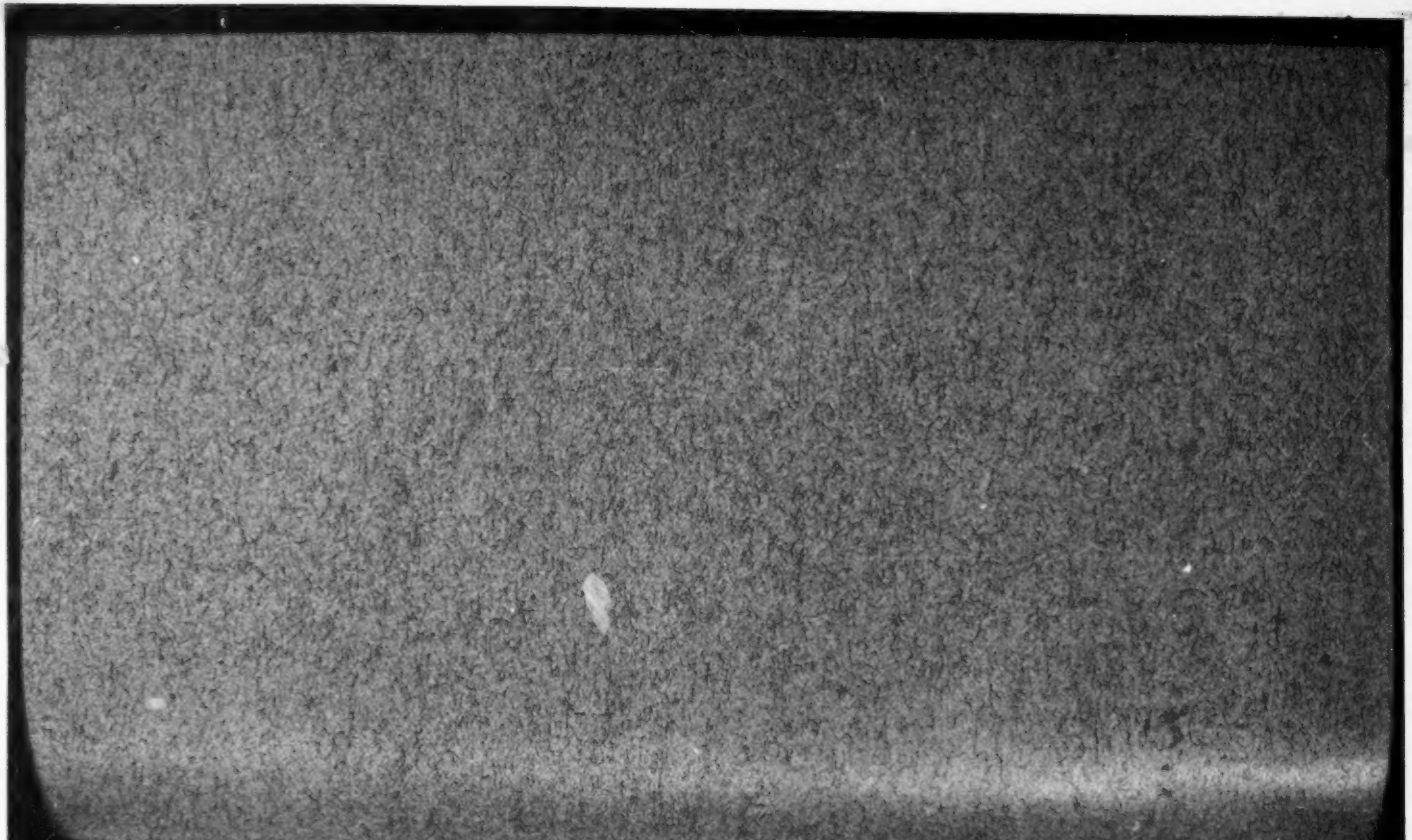
vs.

FRANK W. EATON, ET AL., Defendants in Error.

Motion to Advance Cause on Calendar, Affidavit and Notice.

WALTER AYERS,
Attorney for Plaintiff in Error.

J. L. THWING,
BOOK AND COMMERCIAL PRINTER,
DULUTH, MINN.



Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE MIDWAY COMPANY,

Plaintiff in Error,

vs.

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN AND MARGARETHA LONSTORF.

Defendants in Error.

NOTICE OF MOTION.

Gentlemen:—

You will please take notice, That on Monday the 12th day of November, A. D. 1900, at the Court Room of the Supreme Court of the United States in the Capitol at Washington, D. C., at the opening of said Supreme Court on that day or as soon thereafter as counsel can be heard, a motion, of which the annexed is a copy, to advance the above entitled cause upon the Calendar so that the same may be heard as soon as conveniently may be after the first day of January, A. D. 1901, will

be submitted. Accompanying said motion will also be submitted the affidavit and copy of the decision of the Supreme Court of Minnesota, copies whereof are hereto attached and herewith served upon you.

Yours respectfully,

WALTER AYERS,

4 Attorney for The Midway Company,
Plaintiff in Error.

To Messrs.
J. L. WASHBURN,
Atty. for Leonidas Merritt,
Merrill M. Clark &
Richard H. Fagan.
CHARLES A. TOWNE,
Atty. for Frank W. Eaton and
5 Margaretha Lonstorf.
Defendants in Error.

Service of the foregoing notice of motion, and papers accompanying the same, to-wit, Motion, Affidavit, and copy of the decision of the Supreme Court of Minnesota, are hereby admitted at Duluth, Minnesota, this 27th day of October, A. D.
6 1900.

J. L. WASHBURN,
Attorney for Leonidas Merritt, Merrill M. Clark & Richard H. Fagan.

CHAS. A. TOWNE,
Attorney for Frank W. Eaton and Margaretha Lonstorf,
Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1900.

THE MIDWAY COMPANY,

Plaintiff in Error, 7

vs.

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN AND MARGARETHA LONSTORF.

Defendants in Error.

No. 312.

8

The Midway Company, Plaintiff in Error, above named by Walter Ayers, its attorney, respectfully moves that the said cause which is No. 312 upon the October, A. D. 1900 Term Calendar of this court, may be advanced and heard as soon as conveniently may be after the first day of January, A. D. 1901.

The matter involved in said cause is the validity of a certain location of Sioux Half-Breed 9 Scrip issued under the Act of Congress, approved July 17th, 1854, (10 Stats. at Large, 304), which was cancelled in pursuance of an unpublished decision of the Secretary of the Interior, dated February 18th, 1889.

The Supreme Court of Minnesota by its decision, upon which was based the judgment upon

which the Writ of Error in the above cause was sued out, decided that the scrip location was valid, that the Land Department had no authority to cancel the same and that the patent issued by the United States under which the plaintiff in error claims, conveys no title. The grounds upon which
10 the decision of the Supreme Court of Minnesota rested, were:

First. That the clause contained in said act of July 17, 1854, to-wit: "And provided further, that no transfer or conveyance of any of said certificates or scrip shall be valid" did not prevent or prohibit an assignment by the Half-Breed before location, of the right evidenced by such scrip; that the beneficial interest in said scrip could be assign-
11 ed and transferred although the scrip itself could not be, and that the right to acquire public lands by means of this scrip was not a personal right in the one to whom the scrip issued.

Second. That the clause in said act, providing that said scrip might be located upon "any other unsurveyed lands not reserved by the government upon which they (the Half-Breeds) have respectively made improvements" did not require
12 that any improvements should be made by the Half-Breed or by anyone else as a condition precedent to the location of the scrip thereon, nor at all, unless possibly for the purpose of giving notice to some possible settler upon the same lands, and that in any event such improvements might be made by one, not the original beneficiary, for himself and as a means of procuring the location of the scrip for his own use and benefit.

Third. That as the act of July 17, 1854, did not provide for the issuance of a patent, that no patent was necessary, and the legal title to the land passed by virtue of the location, and the Land Department had no right to assume a supervisory power over the location of Sioux Half-Breed Scrip and no jurisdiction to inquire into the same.

The reasons for this application are as follows:

1st. That many cancellations of locations of Sioux Half-Breed Scrip have been made by the Land Department of the United States beginning shortly after the passage of the act of July 17th, 1854, and continuing to the present time, a more particular reference to which is made in the appended affidavit. Under said decision all titles derived from the United States by patent or otherwise, wherever there has been a cancelation, for whatsoever cause, of Sioux Half-Breed Scrip, are absolutely void, and many titles in Minnesota and elsewhere, as well those of long standing as the more recent titles, are overthrown or clouded.

2nd. That there is still outstanding unsatisfied and in the hands of persons other than the original beneficiaries, a considerable amount of Sioux Half-Breed Scrip, which by reason of the decision of the Supreme Court of Minnesota will be made the subject of sale to purchasers upon the faith of said decision.

3rd. Litigation has already begun in Minnesota based upon said decision of the said Supreme Court instituted by claimants under locations of

Sioux Half-Breed scrip which have been cancelled, to oust the holders of the patent title to the land involved, which, or similar litigation, it is supposed, will be general in said state and extend to all cases wherever there has been a cancellation by the Land Department of a location of Sioux Half-
16 Breed Scrip.

4th. As a special and particular circumstance the fact is referred to, that nowhere in said decision of the Supreme Court of Minnesota is the case of Felix vs. Patrick, 145 U. S., 317, or Carter vs. Ruddy, 166 U. S., 493, referred to, although as shown by the appended affidavit said cases were pressed upon the attention of the Supreme Court of Minnesota. That said decisions in Felix vs.
17 Patrick and Carter vs. Ruddy are directly overthrown by the said decision of the Supreme Court of the State of Minnesota.

5th. That all persons dealing with th Land Department of the United States in the matter of acquiring titles, whether by means of Sioux Half-Breed Scrip or where there has been a cancellation thereof, are left in doubt and uncertainty as to the title to be acquired and the powers and func-
18 tions of the Land Department.

6th. Much important litigation is dependent upon the decision in the above entitled cause, affecting other lands and other parties, a particular reference to which is made in the appended affidavit.

Reference is prayed to the appended affidavit for a fuller and more detailed statement concern-

ing the grounds for the foregoing motion hereinabove set forth, including the copy of the decision of the Supreme Court of Minnesota, annexed to said affidavit.

The objects sought by means of a speedy decision of the above entitled cause, are that titles depending upon Sioux Half-Breed Scrip locations may be settled; that the public may be safe-guarded in the matter of any attempted purchase of any outstanding certificates or scrip issued under the act of July 17th, 1854; that the powers and duties of the Land Department in matters relating to Sioux Half-Breed Scrip may be defined and settled; that the litigation dependent upon the above entitled cause and which has been pending for many years, may be settled and terminated, and that further litigation affecting other lands and between other parties, based upon or growing out of said decision of the Supreme Court of the State of Minnesota, be made unnecessary.

Respectfully submitted,

WALTER AYERS,

Attorney for The Midway Company,

Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1900.

THE MIDWAY COMPANY,

22 Plaintiff in Error and Appellant,

vs.

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN AND MARGARETHA LONSTORF.

Respondents and Defendants in Error.

STATE OF MINNESOTA, COUNTY OF ST.

23 Louis.—ss.

Walter Ayers, being duly sworn upon his oath, deposes and says, that he is the counsel for The Midway Company, the plaintiff in error in the above entitled cause, which is numbered 312 upon the October, A. D. 1900, Term Calendar of this Court, and which involves the same question as the Midway Company substituted for the Germania Iron Company, Plaintiff in Error vs. Frank

24 W. Eaton, and others, Defendants in Error, also upon the October, A. D. 1900, Calendar of this Court, as number 313.

That the action in which the Writ of Error was sued out in the above entitled cause was an action to determine adverse claim to certain real estate situate in the County of St. Louis and State of Minnesota, to-wit: Three lots or tracts con-

sisting of forty acres each, according to the Government survey, and that the action in which the Writ of Error was sued out in the case of the Midway Company substituted for the Germania Iron Company, Plaintiff in Error vs. Frank W. Eaton and others, Defendants in Error, above referred to, was likewise brought to determine adverse 25
claims to a certain other tract or parcel of land containing forty acres according to the Government survey.

That the plaintiff in error claimed title to said tracts of land under and by virtue of patents issued by the United States and that the defendants claimed title to said lands by virtue of two certain locations of Sioux Half-Breed Scrip, issued under the Act of Congress of July 17th, 1854, (10 Stats. 26
304) made by the defendant in error, Frank W. Eaton, claiming to act as agent for one, Orillie Stram, a Half-Breed of the Sioux Nation, to whom the certificates or scrip, by means of which said locations were procured, were originally issued. That said locations by the said Frank W. Eaton, claiming to act as aforesaid, were cancelled in pursuance of a decision of the Secretary of the Interior, dated February 18th, 1889, and unpublished, 27
a copy of which appears in the transcript of record filed in this cause, and which, in so far as it relates to the principal facts, involved in said locations, was in the following words:—"Upon a care-"ful examination of the entire record, I find the "facts to be substantially as stated by your (Com-"missioner of the General Land Office) office de-"cision and outlined herein.

"Epitomized they are as follows:

"The scripee disposed of her scrip, surrender-
"ing possession thereof to some one now unknown.
"Said scrip was accompanied by two powers of
"attorney, executed in blank, one giving author-
"ity to some one not then named, to locate the
28 "scrip; the other, giving a like authority to sell
"the land located upon. The scrip, after many
"years and after passing through several hands,
"lodged in the hands of Frank W. Eaton, who
"thereupon filled up the blanks in the power of
"attorney to locate, inserting his own name as
"that of attorney in fact for such purpose. He
"employed others to make slight improvements
"on the lands in question (then unsurveyed) and
29 "after such improvements, which were scarcely de-
"serving of the name, he located the scrip as at-
"torney in fact for Orillie Stram, the scripee.

"The blanks in the other power of attorney
"(that to sell) were filled up by inserting the name
"of Leonidas Merritt, who it appears was a busi-
"ness partner of said Frank W. Eaton, and said
"Merritt, as attorney in fact of the scripee, exe-
"cuted certain warranty deeds, transferring and
30 "passing title to the lands covered by the scrip
"locations to certain parties therein named, it
"appearing that said parties were Eaton, who had
"made the locations, and three men, Edward
"Byrne, James H. Powers and Joseph Clement,
"who had been by him, or through his agency,
"employed to make the improvements above men-
"tioned.

"Money consideration was expressed in said "deeds, but it is apparent from the evidence that "the real consideration, so far as Byrne, Powers and Clement were concerned, was what they had "done in making the improvements. They got an "undivided one-third interest. The residue went "to Eaton. 31

"The scripee never saw the land. At the date "of the location she had never seen Eaton, who "acted as her attorney in fact, and did not then "know that there was such a person in existence. "She had, as a matter of fact, sold the scrip long "prior to the location, and had no personal interest "in the land, nor were the improvements made for "her personal use and benefit. It was a matter of "no moment to her where the scrip was located, or 32 "whether it was located at all or not. Her ac- "tual interest in the matter ceased when she dis- "posed of the scrip. It was admitted by her so- "called attorneys in fact that she was to have no "interest in the land. For a long time she directly "and positively repudiated Eaton and Merritt as "her attorneys in fact, denying that they acted for "her in any capacity whatever. Afterwards and "but a few days prior to the hearing, she ratified 33 "by deed what had been done by them.

"This ratification, it is evident, was procured "at the solicitation of Eaton or Merritt, or both, "and for a consideration. But such ratification "does not change the fact that the improvements "and location, though made under the guise of a "power of attorney, were made, not under the di-

"rection and in the interest of the scripee, but for "the benefit solely of another not even known to "the scripee, viz: Eaton, who had inserted his "name as attorney in the power executed in blank. "If the location of the scrip was illegal and in- "valid, then the deed of ratification could not give
34 "it validity—could not vitalize that which origin- "ally had not in it the germ or essence of legal "vitality.

"This case is in all essential particulars like "that of Joseph W. Allen, et al. vs. Lewis Merrill, "et al., decided by me this day, (8 L. D. 207—re- "view denied, 12 L. D. 138) so far as the method "of making the scrip locations is a matter of con- "cern, and the reasons of that case are in this
35 "particular applicable to this. Following the rul- "ing of that case, I must hold that the scrip loca- "tions here in question are invalid, and your of- "fice decision so holding is affirmed."

That the said certificates or scrip, two in number, each called for 160 acres of land and by means thereof the said Eaton procured the locations thereof upon then unsurveyed public lands be-
36 longing to the United States, amounting in the aggregate to 320 acres, under the claim made by affidavit, that he was acting as the agent for Orillie Stram, and that the improvements made upon the said unsurveyed lands were made under the personal direction of said Orillie Stram, the Half-Breed, as aforesaid, and for her personal use and benefit. That shortly after the cancellation of said locations of said Sioux Half-Breed scrip,

the lands upon which the same had been located, having meanwhile been surveyed, were thrown open to entry under the public land laws of the United States and thereupon many persons attempted to enter the same, and out of the conflicting claims arising from the numerous attempted entries of said lands, grew controversies affecting 37
the said 320 acres of land so attempted to be appropriated by the said Eaton by virtue of said scrip locations, which have occupied the attention of the Land Department and the courts, State and Federal, including the Supreme Court of the United States, down to the present time, and some of which are still pending, as will be hereinafter more particularly set forth.

The report of the decisions of the Land De- 38
partment and of the courts, State and Federal, growing out of said controversies subsequent to the cancellation of said scrip locations, will be found in the following reports:

Hyde vs. Eaton (on Review), 12 L. D., 157.

McDonald et al. vs. Hartman, 19 L. D., 39
547.

McDonald et al. vs. Hartmann, 20 L. D., 324.

Germania Iron Co. vs. James, 82 Fed., 807.

Germania Iron Co. vs. U. S., 165 U. S., 379.

Germania Iron Co. vs. James, U. S. Cir. Court-Appeals 89 Fed., 811.

Germania Iron Co. vs. James, 98 Fed., 23.

Midway Co. vs. Belden, 98 Fed., 23.

40 The long contest before the Land Department involving the scrip locations and the claims of one Hyde, is referred to in

Hyde vs. Bishop Iron Co., 66 Minn., 24.

Hyde vs. Bishop Iron Co., 177 U. S., 281.

That, including the contest and proceedings relating to the cancellation of said scrip locations the controversy or controversies relating to said
41 320 acres of land have been pending before the Land Department and the courts for more than sixteen years.

Deponent further saith that the Supreme Court of the State of Minnesota, in and by the judgments, to review which the Writs of Error were sued out in said cases No. 312 and 313, as above stated, held that the cancellation by the Secretary of the Interior (or in pursuance of his
42 said decision of February 18, 1889) of the said scrip locations, was unauthorized and illegal and held that no title whatever was derived under the patents issued by the United States Government.

Deponent further saith that all of the litigation both in the Land Office and in the courts, State and Federal, subsequent to the cancellation of said scrip locations in the year 1889, between

the various claimants of said land, has proceeded and been conducted upon the theory and in the belief that the cancellation of said scrip locations was lawful and valid, and that there is a considerable amount of important litigation now pending in the Federal Courts involving the title to said 320 acres of land, or some portion thereof, 43
which is dependent upon the validity of the judgment of the Supreme Court of Minnesota, above referred to, upon which said Writs of Error were sued out, a particular reference to which will now be made.

First. There is the case of Houghton E. James and Charles W. Hillard, appellants, vs. The Germania Iron Company, appellee, now pending in the United States Circuit Court of Appeals, for 44
the Eighth Circuit and assigned for argument on November 21st, A. D. 1900, the printed record in which consists of 811 pages.

Second. There is the case of James Belden, appellant, vs. The Midway Company, appellee, now pending in the said United States Circuit Court of Appeals for the Eighth Circuit and assigned for argument on November 21st, 1900, the printed record of which consists of 787 pages. 45

In neither of said causes is the right, if any, derived under said scrip locations, in anywise involved and in both of said suits is involved the title as between the parties thereto to one of the forty acre tracts comprising a part of the 320 acres embraced in said scrip locations, to-wit, the northwest quarter of the southeast quarter of section

thirty in township sixty-three north of range eleven west of the fourth principal meridian, situate in the State of Minnesota.

That said causes are both being pressed for final determination by the Supreme Court of the United States, but that underlying the rights of
46 the parties in said causes is the right if any, of the said Eaton and his co-defendants in error under said scrip locations.

That if it should ultimately be determined that the judgment of the Supreme Court of the State of Minnesota is without error and should be affirmed, that then the said cases and both thereof would be abandoned for the reason that it would conclusively appear that neither of the parties to
47 said causes had any right or title to the land involved therein, and on the other hand by reason of the great value of the property in controversy and the necessity of developing the bodies of mineral known or supposed to exist thereon, without further delay, it is reasonably certain that said causes will be pressed to their final determination at great expense rather than to await the determination by the Supreme Court of the United
48 States of the question of the validity of the title of said Eaton and his co-defendants involved in the said causes number 312 and 313.

Third. There is also pending in the Circuit Court of the United States for the District of Minnesota, Fifth Division, another case between the Midway Company, Complainant, and Frank W. Eaton and others, Defendants, involving the valid-

ity of the said scrip locations as to three 40 acre tracts of land, the same being a part of the said 320 acres of land attempted to be located, in which cause a stipulation has been signed and filed staying proceedings therein and agreeing to abide the event of the decision of the Supreme Court of the United States in said cause of the Midway Company, plaintiff in error, vs. Frank W. Eaton and others, defendants in error, above referred to. 49

Deponent further says that he is informed in such manner that he believes it to be true, that there are other lands situate within the State of Minnesota, and also elsewhere, upon which parties have located so-called Sioux Half-Breed Scrip issued under the act of July 17th, 1854, which locations have been cancelled by the Land Department of the United States, each and every of which cancellations under the decision of said Supreme Court of Minnesota in the case above referred to, is invalid, and each and every patent issued by the United States to land upon which Sioux Half-Breed Scrip has ever been located and the location cancelled, for whatsoever cause, absolutely void. 50

And deponent alleges that by reason of the said decision the uniform construction of said act of July 17th, 1854, by the Land Department of the United States, as well as by the Courts, has been overthrown and that much litigation will result, based upon and growing out of said decision, especially in the State of Minnesota, where, as deponent is informed in such manner that he believes it to be true, a considerable amount of Sioux 51

Half-Breed Scrip has been located, and deponent alleges that litigation has already begun in Minnesota growing out of and based upon said decision, as hereinafter set forth.

Deponent further alleges that there have been many cancellations by the Land Department, of
52 locations of Sioux Half-Breed Scrip, beginning at an early period and continuing to the present time, but as to the number thereof he is unable to state even a belief, for the reason that all of the decisions cancelling Sioux Half-Breed Scrip locations are not reported or published because as not having gone beyond the Commissioner of the General Land Office, or for other causes, but deponent refers to the following published decisions of the
53 Land Department cancelling Sioux Half-Breed Scrip locations, to-wit:

Allen vs. Merrill, 8 L. D., 207 (on Review), 12 L. D., 138.

Hyde vs. Eaton (on Review), 12 L. D., 157.

Walter Bourke case, 12 L. D., 105.

Cyr vs. Fogarty, 13 L. D., 673.

54

McGregor vs. Quinn, 18 L. D., 368.

Strong vs. Pettijohn, 21 L. D., 111.

Missola Elec. Light Co., 21 L. D., 306.

John W. Poe, 29 L. D., 309.

Deponent also refers to the following unpublished decisions of the Land Department which have come to his notice, to-wit:

Murphy vs. Jones, decided June 29th, 1876.

Eaton vs. Hyde, decided Feby. 18th, 1889.

John F. McGee, referred to in 14 L. D., 523.

55

Deponent also refers to cancellations referred to in the cases of Monette vs. Cratt, 7 Minn., 234.

Corsolle vs. Weyerheauser, 69 Minn., 328.

U. S. vs. Chapman, 5 Sawyer, 528.

Chapman vs. Pollock, 11 Pac. Rep. 767.

Carter vs. Ruddy, 166 U. S., 493.

56

Deponent further states upon information and belief, that very shortly after the rendition of the judgment of the Supreme Court of Minnesota, above referred to, suit was begun in the District Court of Lake County in the State of Minnesota, by the Buffalo Land and Exploration Company by William C. White, its attorney, against Hugh P. Strong and others, defendants, which action is based upon the said decision of the Supreme Court of Minnesota, and involves the validity of the locations of the so-called Sioux Half-Breed Scrip under the act of July 17th, 1854, which action is now pending and which seeks to have it adjudged that the holders of the patent title from the United States have no interest in or title to the lands embraced within the locations of the Sioux Half-Breed Scrip which were cancelled in pursuance

57

of the decision of the Secretary of the Interior, rendered in the case of Strong vs. Pettijohn, reported in 21 Land Decisions, 111, hereinabove referred to, and that the plaintiff in such case claims that the legal title to the lands in controversy passed to it or its grantors by virtue of the location of the Sioux Half-Breed Scrip and that the Land Department of the United States had no jurisdiction to inquire into the matter, and that the patent isssued by the United States Government conveyed no title whatever to said lands, whether legal or equitable. That deponent's information is derived from inquiries made of William C. White, the attorney for the plaintiff, and John Brennan, the attorney retained for the defendants or some of them, and from an inspection of the office copies of the papers in the office of said William C. White.

Deponent further alleges upon information and belief, that there is still outstanding unsatisfied and in the hands of persons other than the original beneficiaries, some considerable amount of so-called Sioux Half-Breed Scrip, which as deponent believes by reason of the decision of the Supreme Court of Minnesota, may be made the subject of sale to purchasers upon the face of the said decision of the Supreme Court of the State of Minnesota.

Deponent further alleges that the said decision of the Supreme Court of Minnesota, in the case above referred to, to-wit, The Midway Company, Plaintiff in Error, vs. Frank W. Eaton and others, Defendants in Error, decided and held:

First. That the clause contained in said act of July 17, 1854, to-wit: "And provided further, that no transfer or conveyance of any of said certificates or scrip shall be valid" did not prevent or prohibit an assignment by the Half-Breed before location, of the right evidenced by such scrip; that the beneficial interest in said scrip could be assigned and transferred although the scrip itself could not be, and that the right to acquire public lands by means of this scrip was not a personal right in the one to whom the scrip issued. 61

Second. That the clause in said act, providing that said scrip might be located upon "any other unsurveyed lands not reserved by the government upon which they (the Half-Breeds) have respectively made improvements" did not require 62 that any improvements should be made by the Half-Breed or by anyone else as a condition precedent to the location of the scrip thereon, nor at all, unless possibly for the purpose of giving notice to some possible settler upon the same lands, and that in any event such improvements might be made by one, not the original beneficiary, for himself and as a means of procuring the location of the scrip for his own use and benefit. 63

Third. That as the act of July 17, 1854, did not provide for the issuance of a patent, that no patent was necessary, and the legal title to the land passed by virtue of the location, and the Land Department had no right to assume a supervisory power over the location of Sioux Half-Breed Scrip and no jurisdiction to inquire into the same.

And deponent appends hereto a copy of said decision, which is published in 82 Northwestern Reporter, page 861, and prays reference to the same.

Deponent further saith that no where in said decision are the cases of Carter vs. Ruddy, 166
64 U. S., 493; Felix vs. Patrick, 145 U. S., 317, or other decisions of the Supreme Court of the United States referred to, although deponent alleges that both upon the oral argument and in his printed brief in the case in question before the Supreme Court of the State of Minnesota, were said cases pressed upon the attention of said court.

Deponent further saith that the said decision of the Supreme Court of Minnesota, now consti-
65 tutes the law of said state and affects many titles in said state, but as to the number of titles so affected deponent is unable to form an opinion.

Deponent prays that the said cause of the Midway Company, Plaintiff in Error, vs. Frank W. Eaton and others, Defendants in Error, being case No. 312 upon the October, A. D. 1900 Term Calendar in the Supreme Court of the United
66 States, may be advanced upon said Calendar and heard as speedily as may be, but not before January 1st, A. D. 1901, to the end that titles depending upon Sioux Half-Breed Scrip locations may be settled, that the public may be safe-guarded in the matter of any attempted purchase of outstanding certificates or scrip issued under the act of July 17th, 1854, that the powers and duties of the Land Department in matters relating to Sioux

Half-Breed Scrip may be defined and settled; that the litigation dependent upon said case of the Midway Company, Plaintiff in Error vs. Frank W. Eaton and others, Defendants in Error, may be settled and terminated and further litigation affecting other lands and between other parties based upon or growing out of said decision of the Supreme Court of the State of Minnesota made unnecessary. 67

WALTER AYERS.

Subscribed and sworn to before me this 27th day of October, A. D. 1900.

E. P. KIRBY,
Notary Public,
(Notarial Seal.) St. Louis County, Minn. 68

69

MIDWAY CO. vs. EATON, ET AL.

COPY OF OPINION OF

SUPREME COURT OF MINNESOTA.

244

MIDWAY CO. v. EATON et al.

(Supreme Court of Minnesota. May 16, 1900.)

PUBLIC LANDS—HALF-BREED SCRIP—LOCATION—SECRETARY OF INTERIOR—AUTHORITY—CANCELING LOCATION.

1. By virtue of the act of congress of July 17, 1854 (10 Stat. 304), there was issued to one Orillie
245 Moreau, a mixed blood of the Sioux Nation, five pieces of what is known as "half-breed scrip"; one of these pieces, for 160 acres, being described as "No. 19 D." This piece was located June 18, 1883, on unsurveyed lands in the Duluth district by one Eaton, who held a power of attorney executed and delivered by the recipient of the scrip and her husband,—she having married a man named Stram in the meantime,—which power authorized Eaton to locate the scrip, and to do all acts necessary to secure a permanent and bona fide location thereof. After the land was surveyed, and on July 21, 1885, the location was adjusted at the local
246 office to governmental subdivision on the application of the attorney in fact. In a contest instituted by one Hyde, who claimed the land under the pre-emption act, the commissioner of the general land office held the Stram entry unauthorized and invalid, and that the same should be canceled and set aside. This decision was affirmed by the secretary of the interior February 18, 1889. Hyde's claim was disposed of adversely to him at the same time. The land was subsequently patented by the United States to one Hicks, under the homestead act, and Hicks' successors in interest brought

this action to determine adverse claims against defendants, who assert ownership under the Stram entry. On findings of fact the court below held, as conclusions of law, that the plaintiff held the legal title to the land in trust for defendants, in certain undivided shares, and that said defendants were and are the owners thereof, and ordered judgment accordingly. **Held,** that the secretary of the interior acted without the authority of law when he decided the Stram entry or location to be 247
unauthorized and invalid, and for that reason affirmed the order of the commissioner canceling the same.

2. **Held,** further, that the scripee, or her successors in interest, could not be deprived of their rights in the land by the assumption of a supervisory power by the officials in the land department, or by the issuance of a patent to another.

3. **Held,** that the findings were supported by the evidence, and justified the conclusions of law.

(Syllabus by the Court.)

248

Appeal from district court, St. Louis County; S. H. Moer, Judge.

Action by the Midway Company against Frank W. Eaton and others. Judgment ordered for defendants. From an order denying a new trial, and from the judgment, plaintiff appeals. Affirmed.

249

Walter Ayers (P. H. Seymour, of counsel), for appellant, J. L. Washburn, W. D. Bailey, Towne & Harris, Frank Cutting, and Phelps & McClintock, for respondents.

Collins, J. Action to determine an adverse claim to three governmental subdivisions situated in St. Louis county. The court below found against plaintiff, the corporation, and ordered judgment

in favor of the defendants, as owners of undivided interests. The appeal is from an order denying a new trial, and also from the judgment thereinafter entered. This case is another chapter of the controversy which has been in progress since 1883, in the courts and in the interior department of the
250 general government, over that well-known and very attractive section 30. The particular tracts here involved were referred to in the case of Iron Co. vs. Hyde, 66 Minn. 24, 68 N. W. 95, recently affirmed in the supreme court of the United States,as those upon which had been located, prior to the initiation of Hyde's claim, Sioux Half-Breed scrip No. 19 D, issued to a woman named Moreau, which location was contested by Hyde as therein
251 set forth,—a contest which resulted disastrously to both parties; the secretary of the interior finally sustaining the decision of the commissioner of the general land office that the scrip location should be canceled for noncompliance with the law, and that Hyde had no rights as a pre-emptor, because he had previously contracted to sell and convey to a third party a portion of the land he proposed to acquire. In 1898 the land in question,
252 a part only of that covered by the Moreau scrip, was patented by the United States under the homestead act to one Hicks, and the plaintiff's claim of title is derived from him. The defendants assert ownership through and under the scrip location; their position being that the same was unlawfully canceled by the officials of the land department, that the scripee could not be deprived of rights obtained under the location or entry, that

the patent subsequently issued to Hicks, inured to the scripee's benefit, and that the former and the plaintiff, who purchased with notice, held the land in trust for defendant. It is this trust which the court below enforced through the judgment appealed from. As we regard the case, the rights of the respective parties rest upon the legality 253
of the rulings in the land department; the last being the affirmance by the then secretary of the interior of the order of cancellation, as made by the commissioner of the general land office August 4, 1888. This affirmance bore date February 18, 1889, and is unpublished. It was sustained by the successor in office of said secretary. See Hyde vs. Eaton, 12 Land Dec. Dep. Int. 157. In the Hyde Case much of the history of this contest in the department is related. The testimony was taken be- 254
fore the local land officers, who were of the opinion that the scrip entries were valid. Certified copies of the testimony of the witnesses produced at this hearing were received in evidence in the court below. The written opinion of the local officers, and the findings made by them, if any, were not there presented. Nor was there introduced the findings of fact and conclusions of the commissioner as they appeared, undoubtedly, in his decision 255
of August 4, 1888. But parts or all of these findings were recited in the decision of affirmance made by the secretary, of date February 18, 1889; a certified copy of the same having been received in evidence at the trial. From this copy and other testimony it appears that on June 18, 1883, one Eaton, as attorney in fact for the Half-Breed, who

had in the meantime married a man named Stram, and who will hereinafter be called Mrs. Stram, filed the scrip in question, with other pieces, upon tracts of unsurveyed land in the Duluth district. The necessary affidavits, with the powers of attorney, and diagrams to locate and identify
256 the tracts, were also filed. All of the steps required by the rules and regulations of the land department seem to have been taken in due form. July 21, 1885, upon the application of the attorney in fact, scrip No. 19 D was adjusted by the local officers to the governmental subdivisions herein involved, and other subdivisions; the land having been surveyed by the authorities just previously. The Hyde contest was commenced the day before.
257 We now come to facts which, from the decision of the secretary, it appears were found by the commissioner in his decision affirmed by the secretary, as before stated: (1) It was found that accompanying the scrip, and application to locate the same, was what purported to be the original power of attorney given May 25, 1883, by the scripee and her husband to Frank W. Eaton; that with the application was an affidavit by said Eat-
258 on setting out that he, under said power of attorney, had caused to be built upon the tracts upon which the scrip was located a house 14 by 16 feet, one story high, of timber, covered with split shingles, with doors and windows; that he also had cleared one-half acre of land. And also setting forth: (2) That said improvements were made under the personal direction of the scripee, and for her personal use and benefit. (3) It was

found by a clear preponderance of evidence that said Eaton, by virtue of his power of attorney, employed Edward Byrne to make the improvements upon the tracts in question, and that Byrne secured the services of Powers and Clement to assist him in the matter. (4) That Eaton admits 259
that the power of attorney under which he acted was executed by the scripee in blank; that he never saw the scripee until March 31, 1886, never saw the land, and did not know whether said scripee ever saw it or not ;that the deed of confirmation by the scripee appears, so far as she and Eaton are concerned, to remove any objection to the acts previously performed by the latter under and by virtue of his said power of attorney. (5) That in 260
the record are what purport to be an original power of attorney given by the scripee and her husband to Leonidas Merritt, granting him full power and authority to enter upon and take possession of any and all pieces or parcels of land in the state of Minnesota which they then owned, or might thereafter acquire or become interested in, by virtue of the location of the scrip in question; to prosecute and defend any suit at law in the courts 261
of said state; and to grant, bargain, sell, demise, lease, convey, and confirm said land, or any part thereof, by deed, conveyance, demise, or lease, in the same manner as if performed by them individually. (6) That on March 31, 1886, the scripee and her husband joined in a deed of confirmation ratifying and confirming, all and singular, the acts of Frank W. Eaton and Leonidas Merritt relative to

the tracts in question, done and performed by them under the respective powers of attorney given as hereinbefore described.

The decision contains further recitals of findings, which appear to us to be of no value when passing upon the main question before us, and
262 we shall have no occasion to again refer to them, except incidentally. The decision proceeds, after stating facts, as follows (the italic being our own): "This would seem, on its face, to point to an adjudication in favor of the scrip locations; but your office decision further proceeds to say that the only other question left to pass upon, touching the legality of these locations, is whether the power of attorney given by the scripee to Frank W.
263 Eaton, by virtue of which he made the location, *could carry with it, under the law, the power and authority to make the improvements* which were necessary as a prerequisite to valid location of the scrip on unsurveyed land. On this question your office decision concludes that since the evidence shows clearly that the scripee in this case never saw the land or the improvements, or had anything whatever to do therewith, and since the circular referred to supra requires that the Indian
264 shall have a direct connection with the land, and claim the same for his or her personal use, the thing whatever to do therewith, and since the *circular referred to supra requires that the Indian shall have a direct connection with the land, and claim the same for his or her personal use*, the scrip locations are not valid, and should be canceled, as speculative and made with an evident intent to evade the law, rather than to comply in

good faith with legal requirements." The circular referred to was one issued in 1864 by the land department to the local officers, in which the latter were advised that scrip could be located: "(4) Upon any other unsurveyed land,, not reserved by government, upon which they have respectively made improvements. (5) When not located by the 265
reservee in proper person, the application to locate must be accompanied by the affidavit of the agent that the reservee is living, and that the location is made for the sole use and benefit of said reservee. The land selected in satisfaction of a certificate of scrip must, of course, be located in the name of the party in whose favor the scrip is issued; and the location may be made by him or her in person, or by his or her guardian or duly 266
authorized agent." The secretary then proceeds to consider the facts, "epitomized," as he claims, making several statements which are not founded upon any evidence now before us; and then he characterizes the improvements as "scarcely deserving the name." In all essential particulars, said the secretary, the case is like that of Allen vs. Merrill (decided by him on the same day) 8 Land Dec. Dep. Int. 207, review denied in 12 Land Dec. 267
Dep. Int. 138; and, following the ruling in that case, the secretary held the location invalid. If, on the facts as found, the secretary correctly interpreted and applied the law which governs in such cases, his decision must be upheld. But, if there was error in the construction of the statute, the decision is of no binding force in this litigation. Before considering the law under which the scrip

was located, let us briefly refer to the facts found by the commissioner of the general land office, according to the secretary's decision. The contents of the affidavits as to the extent of the improvements made by Eaton are recited, and inferentially, at least, are found to be true. These im-
268 provements consisted of a log house 14 by 16 feet in size, one story high, covered with split shingles, with a door and a place for a window. Half an acre was cleared. This was done in June, under the direction of Eaton, who held a power of attorney, executed by Mrs. Stram and her husband, less than a month before, to locate this scrip, and "to do all acts necessary to secure a permanent and bona fide location thereof." We are clearly of the
269 opinion that, from the secretary's decision, it appears that the commissioner found these improvements to have been made prior to the location. And it also appears that the commissioner found that they were made by persons employed by Eaton for the purpose, and by virtue of his power of attorney; the question being, as stated by the secretary, whether the power to locate carried with it, under the law, the authority to make the improvements
270 required to be made upon the location of scrip on unsurveyed lands. As the scripee never saw the land or the improvements, had no direct connection with the land, and never claimed the same for her own personal use, it was held that the location was invalid, and the cancellation seems to have followed as a consequence.

The law under which scrip was issued to the Half-Breeds or the mixed bloods of the Sioux na-

tion was the act of congress of July 17, 1854 (10 Stat. 304). The act is not complicated, and in some respects is quite indefinite, but it empowered and authorized the president to cause to be issued to certain mixed bloods certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the Pepin 271
reservation among them pro rata. There was a provision that these certificates or scrip might be located upon the lands within the reservation, or upon other unoccupied lands subject to pre-emption or to private sale; that is, lands which had been surveyed, and also upon unsurveyed lands not reserved by the government, "upon which the applicants have respectively made improvements." There was a provision that these certificates or 272
scrip should not embrace more than 640 nor less than 40 acres each, and they were to be equally apportioned among those entitled. To ascertain who was entitled, reference must be had to the ninth article of the treaty of Prairie du Chien, of date July 15, 1830 (7 Stat. 331), from which it will appear that in a very general manner the reserved or Pepin tract was bestowed upon the Half-Breeds of the Sioux nation; they to hold as all other In- 273
dian titles were held. Thereafter, and as empowered by the 1854 act, the president caused certificates or scrip to be issued to these mixed bloods indiscriminately, and without reference to age, sex, or other conditions. The result was that old and young, adults and minors, male and female, those that had but little Indian blood in their veins and those in whom such blood greatly pre-

vailed, were the recipients. And this fact is not to be ignored when discussing the correctness of the secretary's views as found in his decision of February 8, 1889. Under the law there was issued to each one of the 640 persons (Mrs. Stram being one of the 640) five pieces of scrip, thus described:
274 1 A, 40 acres; 1 B, 40 acres; 1 C, 80 acres; 1 D, 160 acres; 1 E, 160 acres,—a total of 480 acres each. To each one of 38 persons there was issued one piece of 40 acres, and two for 160 acres,—in all, 360 acres to each. And this is another fact to be kept in mind. There was also another proviso in the act of July 17, 1854,—"that no transfer or conveyance of any of said certificates or scrip shall be valid." It is clear that this is a positive and em-
275 phatic prohibition on the assignability of the certificate or scrip, but it is not a prohibition upon a conveyance of the land upon which scrip had been located. As was said in Gilbert vs. Thompson, 14 Minn. 544 (Gil. 414): "No restraint is imposed upon the right of property in the land after it is acquired by location of the scrip. In the scrip itself the half-breed had nothing which he could transfer to another, but his title to the land, when perfect-
276 ed under it, was as absolute as though acquired in any other way. It follows that any attempt to transfer the scrip, directly or indirectly, would be of no effect as a transfer. The title to the scrip would remain in him, and the title to the land acquired by it would vest in him, just as though no such attempt had been made. Such attempt to transfer would not involve any moral turpitude, nor the breach of any legal duty, as is the case

with an attempt to transfer a pre-emptive right. It would be simply ineffectual because the scrip is not transferable."

Further considering the law, it is well to look at the construction placed upon it by the officers of the interior department soon after scrip was issued to the beneficiaries,—a construction con- 277
temporaneous with the passage of the law. We find that immediately after its issuance a circular was promulgated by the commissioner of the general land office for the information and guidance of the local officers, a clause of which read that locations might be made "upon any unsurveyed land, not reserved by government, upon which they have respectively made improvements. Where the scrip may be located on unsurveyed lands 278
outside the reservation on which the Half-Breed has improvements and which is not reserved by the government, his application for location should be accompanied by a diagram and description denoting the natural objects and distances so as to fix with certainty the exact locality wanted, which serves as the best notice in our power to settlers that conflict may be avoided, and enable you, when the public surveys are made, to desig- 279
nate the legal sub-divisions embracing the location." 1 Lester Land Laws, 628. We have discovered that it was required, not that the improvements upon unsurveyed lands must be of a reliable or permanent character, or that they should be made by the scripee or under his personal direction, but that the application should be accompanied by a diagram and description,

that the exact locality might be designated, and thus, in connection with the improvements upon the ground, conflicts might be avoided between claimants, and the locations more easily and certainly adjusted when surveys were actually made. The making of improvements by or under the
280 scripee's immediate direction was not made of prime importance by the commissioner when preparing these instructions. The practice and custom of making scrip entries was definitely understood and well settled in the 17 years which followed, prior to the issuance of another circular in the year 1864, emanating from the same office and for a like purpose; and from this we have hereinbefore quoted. In this circular it was stated
281 that where a Half-Breed, for himself, may make actual settlement, his improvements will be notice on the ground to any other settler. And we are of the opinion that the purpose of this feature of the law, requiring improvements to be made where the scrip was located on unsurveyed lands, must have been that visible notice, by work done on the ground, might thereby be given to other persons of the scripee's prior right, and thus prevent col-
282 lision and conflict. The language as to improvements was general and vague. None were required where surveyed lands were located and it is very evident that this requirement was for a minor purpose. Obviously, it was not the design of the law to compel actual settlement or residence upon the land; for, had it been, the language would have been plain and unambiguous. This purpose was accomplished wherever the improvements

were of such a character as to be notice, and their value of extent was of little consequence. That in this case they were ample, as notice, ought not to be questioned. The entire purpose of the act itself seems to have been to promote and secure an exchange of the interests of the mixed bloods in the reservation, which was becoming valuable 283
for actual settlers, for certificates or scrip which would be available for the acquirement of title in fee to specific parcels of land there or elsewhere on the public domain. It was proposed to compensate the mixed bloods, who surrendered their rights or claims under the treaty, in a manner which would be of some value; and it has been held that the fact that the government saw fit to make the scrip, as such, non-assignable, does not operate to prevent the beneficiary from making 284
an agreement before location, or giving power to convey the land when the scrip shall have been located and the land entered.

We need not cite decisions in support of this proposition for they are abundant,—federal and state. Nor need we stop to consider why congress saw fit to declare that the scrip should not be assignable, and yet failed to deprive the scripee of 285
the power of alienation immediately after the location, and in pursuance of a bargain previously made. It is enough to know that the prohibition related solely to assignments of the scrip itself. So that, as before stated, the question is, was the land validly appropriated by the location of the scrip in the name of Orillie Stram, to whom it had been issued, with four other pieces; and the only

invalidity found by the commissioner of the general land office and the secretary was that Mrs. Stram had not seen the land or improvements, and did not have direct connection with either, and never claimed the same for her personal use. The rules and regulations of the land department had
286 not been compliel with, it was stated, and it was held that this was sufficient to justify the cancellation.

Under the decisions of the land department, as well as those of the courts, a scripee can empower another to do all things necessary as a condition precedent to a location, and then to actually locate. The improvements were made under the direction of a duly authorized agent, and then the
287 entry was made in the name of the scripee by the same agent or attorney in fact. Mrs. Stram did not complain of this entry, and urge that her rights had been disregarded. Upon the other hand, she ratified and confirmed every act performed by her attorneys in fact, by a properly executed deed, executed in March, 1886. Now, when we examine some of the provisions of the law, we are led to ask, could it have been the in-
288 tention that each person to whom certificates or scrip was issued should see the land, in person, upon which each piece was to be located, or should, in person, see the improvements, or claim the same for personal use, or be directly (that is, personally) connected with either or both? Under this law the president was authorized to do what was actually done,—issue to each person entitled several pieces of scrip, of different sizes or acre-

age. Was it expected that each of these persons should be personally connected with the several and separate improvements required to be made, if all of the pieces were located on unsurveyed lands and would have to claim the same for personal use? Surely not. This law contemplated and there was actually issued several pieces of 289
scrip to each of a large number of minors. Babes in arms were held to be entitled, and to them scrip was issued, anl in many cases located before the minors reached majority, as might reasonably be expected. With these facts before us, can it be urged that congress thought or intended that these minors would be required, by a construction of the law, to personally supervise the selection of from three to five tracts of land on which to locate 290
their pieces of scrip, or that they would have to be directly connected with each of these locations, or, in case unsurveyed lands were desired, they would have to claim the necessary improvements as their own? In other words, do not these facts indicate, to a moral certainty, that it never occurred to the members of congress that the construction placed on this law by the secretary would be given to it at any time,—much less, after 30 years of a wholly 291
different construction? And a construction, also, which received judicial recognition and approval. See Gilbert vs. Thompson, supra; Hope vs. Stone, 10 Minn. 141 (Gil. 114); Marks vs. Dickson, 20 How. 501, 15 L. Ed. 1002. We are confident that they do so indicate, and that the requirements found in the circular of May 28, 1878, were not in accordance with the law, and were therefore unauthoriz-

ed. The act itself never required that the improvements should be of a certain kind or value, or that the scripee should be directly connected with the land. It quite conclusively appears to the contrary, when we consider the facts before referred to, unless we take the position that the legislative
292 branch of the general government intended to confer upon the mixed bloods, in exchange for their interest in the reservation, scrip which would be of no value unless the recipients made personal selections, were directly connected with the locations and improvements, and made claim to both for their own use and benefit.

It is urged that Eaton's entry amounted to an evasion of that part of the law which forbade an
293 assignment of the scrip; the well-known rule being invoked, that an act which cannot be done directly cannot be accomplished indirectly. But if an agent can be authorized by the scripee to do all acts that may be necessary as a condition precedent to a location, and may also be authorized to carry the scrip to the land office and complete the entry (and this, it is well settled, may be done), why is not the prohibition evaded quite as com-
294 pletely as the secretary claimed it was in this case? The evasion is in every case where a contract of sale is made or contemplated, if it is in one. Locations under such circumstances have been repeatedly, almost universally, upheld; the officials of the department declaring, however, that the scripee cannot assign the scrip, that the location must be in the name of the person to whom the same was issued, and that the patent

must be so issued, but further holding that, as the power to alienate is unrestricted by the law, agreement to sell is not a matter for determination in the land department. It seems very apparent that the effect and validity of such an agreement must be left to the arbitrament of the courts, and not to the decisions of he government officials. 295

We have not discussed the point made by counsel, that as the method adopted by Mr. Eaton was in accord with the long continued practice of the department, as set out in its circular of 1857, the action of the commissioner and the secretary should be set aside as unwarranted. We think it unnecessary. Nor do we consider at length the further point that the location of July 21, 1885, after the lands had been surveyed and the plats 296 returned, was a valid location, even if the earlier one was invalid for the reasons assigned by the officials. It is true that the Hyde claim was the only one intervening when this crip was adjusted or again located, and that claim was corrupt and invalid, as has been finally determined. So when the application of July 21st was made there was no valid, existing, adverse right which had attached, and which stood in the way of a location 297 of the scrip as upon surveyed lands, no improvements being necessary. There was no forfeiture of the scrip by the previous attempt to locate. If invalid, it was nothing but an attempt. No moral turpitude or breach of any legal duty was involved in the first location. If Mr. Eaton, as the agent, had there expressed a desire to withdraw and relinquish all rights acquired previously, and

to lay that particular piece of scrip on the land in question, as of that day, would not his right so to do seem unquestionable? And would not the obligation of the local officers to permit this act to be done appear to be beyond doubt? If this be true, why was not the legal effect of the adjust-
298 ment a location of the scrip upon surveyed lands, there being no valid claim or right intervening and in conflict? The application then made was sufficient in form for an original location. If the scripee, Mrs. Stram, either in person or by agent, could that day have successfully applied for this land, had she never made any previous attempt to obtain it, why should the application be rejected? Surely not on the ground that she had tried
299 before, and failed while the land was unsurveyed. Our conclusion is that upon the facts as found, hereinbefore stated, the commissioner of the general land office and the secretary of the interior erroneously construed the law, and imposed unwarranted conditions. The decision of the latter appears to have been predicated upon a circular of instructions, not upon a statute. It was error to hold that under the act in question it was vital
300 that the scripee should see the land or the improvements prior to the entry, and that an agent could not act in her behalf, when duly authorized, not only in selecting the land itself, but in making such improvements as would in themselves, and without regard to their value, be notice on the ground of the assertion of a prior right. It was error to hold that the scripee had nothing to do with these improvements, for she had empower-

ed an attorney in fact to make them. It was error to hold that the scripee must have direct connection with the land. And if, by his decision that the scripee must claim the land for her own personal use, the secretary meant that such claim must be formally made, or made in good faith, or must be established by proof other than or different from that before the land department in this particular case, he was in error. There was not even an intimation in the law that the scripee should personally inspect or select the land, or should make in person, or even examine, the improvements. Scrip was issued in from three to five separate and distinct pieces, and of different acreage. It was issued to persons who were old and decrepit,—physically and permanently incapable of complying with the requirements established by the secretary. Was the fact that they were old and disabled to be used to their injury, and were they to have nothing but unavailable pieces of paper? Certificates of scrip were issued to infants who would not reach a suitable age for obeying the behests of the land officials for a score of years. Were they expected to act through guardians or other agents, and have some benefit of the provisions of the law, or were they expected to wait until majority came to them, and then to comply with the circular requirements? No distinction or discrimination was made in the law between the adult and the minor, and the department could impose none by requiring less of the minor making a location than of the adult. Nor did the law require that the land on which the

301

302

303

scrip was located must be selected by the mixed bloods for personal use, or even that a claim of this kind should be made. In fact, as we have seen, the inference to be drawn from its language, and from what was done at and about the time, is to the contrary. And the secretary erred in holding, upon the facts as found, that the scripee had
304 no interest whatever in the location made by her attorney in fact. Such a holding is, in effect, deciding that every piece of scrip issued to the mixed bloods which cannot be used by the recipient for his or her own personal benefit, and for the acquirement of land for his or her own personal use, could not be used at all, and was of no value.

Finally, we hold that on the facts and the law
305 the location in behalf of Mrs. Stram was proper and valid. It was error on the part of the officials of the land department to cancel the location and entry. Mrs. Stram or her successors in interest could not be deprived of her rights in the land by the assumption of a supervisory power by these officials, or by the issuance, under their direction, of a patent to another person. The act of July 17, 1854, did not provide for the issuance of a patent, and the title to the property passed to Orillie
306 Stram, nee Moreau, by virtue of the location. The findings of fact justified the conclusions of law in the court below, and the judgment is affirmed.

Lewis, J., did not sit.

[illegal/illegible]

[illegal/illegible]

IN THE

SUPREME COURT

OF THE UNITED STATES.

[illegal/illegible]

THE MIDWAY COMPANY,

Petitioner in Error,

vs.

FRANK W. EATON,
LEANDER SECRIST,
MERRILL M. CLARK,
RICHARD H. FAGAN and
MARGARETTE LOWSTONE,

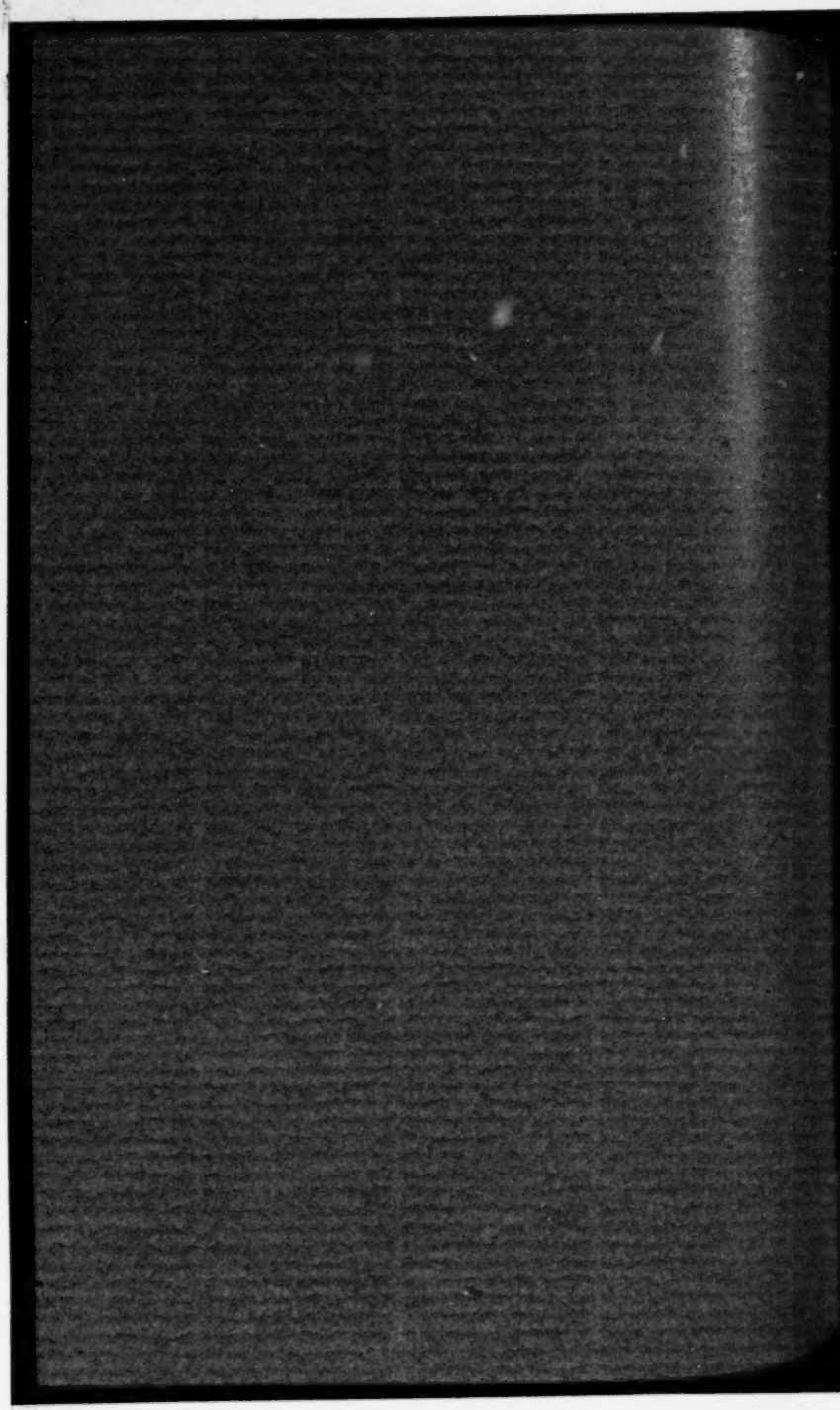
Defendants in Error.

AFFIDAVIT AND CONSENT

UPON MOTION TO ADVANCE CAUSE UPON THE CALENDAR.

CHAS. A. TOWLE,
JED J. WARBURTON,

Attorneys for Petitioner in Error.



SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, A. D. 1900.

THE MIDWAY COMPANY,
PLAINTIFF IN ERROR.

vs.

FRANK W. EATON,
LEONIDAS MERRITT,
MERRILL M. CLARK,
RICHARD H. FAGAN AND
MARGARETHA LONSTORF,
DEFENDANTS IN ERROR.

No. 312.

STATE OF MINNESOTA, }
COUNTY OF ST. LOUIS. }

JED L. WASHBURN, being duly sworn, says that he is counsel for the defendants in error, Leonidas Merritt, Merrill M. Clark and Richard H. Fagan, and is associated in said cause with Messrs. Charles A. Towne and Luther C. Harris, the counsel for the defendants in error, Frank W. Eaton and Margaretha Lonstorf.

That the counsel for the defendants in error have been served

with a notice of motion, to be heard on the 12th day of November, 1900, by Walter Ayers, Esq., counsel for the plaintiff in error, for the advancement of said cause upon the calendar, which motion papers consist in part of the affidavit of said Walter Ayers and a copy of the decision of the Supreme Court of the State of Minnesota in said cause.

That by way of response to certain matters set forth in the affidavit of said Walter Ayers, this affiant avers: That said action was brought by the said The Midway Company as plaintiff against the said defendants in error as defendants, in the District Court of St. Louis County, Minnesota, in April, 1899, for the purpose of determining adverse claims to Lots 3, 5 and 6 in Section 30, Township 63, north of Range 11 west, and was brought on for trial in said court on the 12th day of June, 1899; that said action involved the validity of certain Sioux half-breed scrip locations of said lands under which the defendants claimed to own the same; that said cause resulted in a judgment in favor of the defendants in said court, which judgment was rendered on the 2nd day of January, 1900, wherein it was decreed that the defendants were the owners of said lands.

That the Secretary of the Interior had, by the unpublished decision referred to in said moving papers, assumed to cancel said scrip locations and to throw the said lands open to subsequent entry, and through subsequent proceedings in the land department, to which the defendants were not parties, the plaintiff claimed to be the owner of the premises, with full knowledge, however, of the rights of the defendants, and in and by said judgment it was decreed that whatever title, if any, accrued by virtue of the patent issued to the predecessor of the plaintiff, should enure to the said defendants; that from an order denying a new trial and from said judgment said plaintiff appealed to the Supreme Court of the State of Minnesota and upon said appeal

the said Supreme Court of the State of Minnesota, by decision rendered May 16th, 1900, affirmed the decision of the trial court.

That in said action, brought as aforesaid in the said District Court of St. Louis County, Minnesota, the rights of said defendants, as to said lands, were brought in issue in court for the first time, all of the various litigation theretofore had, both in the land department and in the courts, being between the various parties who, subsequent to the entry of said lands under Sioux half-breed scrip, had attempted to obtain title thereto.

That although the Supreme Court of the State of Minnesota held, among other things on said appeal, that a patent was not necessary in order to pass the legal title on Sioux half-breed scrip locations, nevertheless as to whether said patent was necessary to pass the legal title was not material to the determination of the rights of these parties upon said appeal in the said Supreme Court of Minnesota, and the Secretary of the Interior, in the decision referred to in said moving papers, had already held that such patent was not necessary.

Deponent further says that he is informed in such manner that he believes it to be true, that the defendants and their predecessors in interest have maintained possession of said premises ever since the location of the same by means of said Sioux half-breed scrip.

This deponent further says, upon information and belief, that very little, if any, Sioux half-breed scrip remains outstanding unlocated, and that the greater portion of such scrip has long since been located, and, as he is informed in such manner that he believes it to be true, located in practically the same manner as that involved in this case, and that the said decision of the Supreme Court of Minnesota does not operate to unsettle, but rather to settle the multitude of titles already held under Sioux half-breed scrip locations, and that it is claimed by the defend-

ants in error that the location of the scrip in the case here involved was in strict accordance with the uniform practice of the land department down to the time when the Secretary of the Interior assumed to cancel the scrip locations in this case and, simultaneously therewith, the scrip location involved in the case of Allen vs. Merrill, referred to in the moving papers.

Deponent further says that it is true that subsequent to the said decision of the said Supreme Court of Minnesota, hereinbefore referred to, the same plaintiff, The Midway Company, brought suit in the Circuit Court of the United States for the District of Minnesota, Fifth Division, against the same defendants, to determine adverse claims to three other forties of land involved in the same locations, the said scrip locations, in fact, having covered 320 acres of land, and that the said case was upon the calendar of the October, 1900, term of said court at the City of Duluth in said division, and said cause was disposed of by stipulation that the same should abide the decision of the Supreme Court of the United States in this case.

That as to the statement contained in the affidavit of the counsel for the plaintiff in error, relative to the decision of the Supreme Court of the State of Minnesota in said cause, this deponent craves reference to said decision as to what was determined by the said court thereby.

Deponent further says that the record in this case as to said scrip locations will show that Frank W. Eaton, desiring to acquire the said lands, or an interest therein, made arrangements with the scripee, Orillie Stram, through her agent, for the location of her Sioux half-breed scrip thereon, and that said Orillie Stram executed a power of attorney to locate the same which, being delivered to said Eaton, together with said scrip, he proceeded to locate and enter said lands thereon in the name of said Orillie Stram; that said Orillie Stram also executed a power of attorney

to convey the same, under which said lands were conveyed after location, and thereafter executed and delivered to said Frank W. Eaton, her husband joining therein, a deed in full confirmation of the location and entry of said lands and the conveyance made thereof, prior to any adverse rights or interests attaching thereto, but that thereafter and after final receipt had been issued, delivered and recorded, upon an attack being made by an outside party who desired to obtain said lands, but whose entire proceedings therewith were held by the Secretary of the Interior, as well as by the courts, to be fraudulent and giving rise to no interest whatever, the Secretary of the Interior, by the decision referred to in the moving papers, assumed to cancel said scrip locations, after the rights of the defendants or their predecessors had become vested in said lands.

That as to the cases of James vs. Hilliard and Belden vs. The Midway Company, referred to in the moving papers, affiant states that both refer to the same forty acre tract of land and admits that if this cause is decided in favor of the defendants in error, the effect of the determination will be to dispose of any claim on the part of either party in said actions to the tract of land there involved, said tract being the remaining forty acres covered by said Sioux half-breed scrip locations; but neither this deponent nor his clients have any interest in the determination of said actions, nor do they know, except by the moving papers herein, that the same are set down for hearing on the 21st day of November, 1900, but deponent suggests that the advancement of this cause upon the calendar to January, 1901, without some order of the court in the cases above referred to, would work no relief to the court from the burden of hearing said causes, and that because said cases are set for hearing in November, 1900, is without force as a reason for the advancement of this cause upon the calendar to January, 1901.

Deponent further says, upon information and belief of such character that he believes the same to be true, that the other actions referred to in said affidavit and in said moving papers involve in no material degree the public interest.

That this affidavit is not made for the purpose of resisting any application properly made for forwarding said cause upon the calendar, but is made for the purpose of not leaving unchallenged certain statements and imputations contained in the moving papers, believed by the defendants in error to be wholly irrelevant and immaterial to a motion to advance said cause upon the calendar; that this deponent has professional engagements in court which will occupy well nigh all of the month of January, 1901, and desires that said cause be not advanced upon the calendar earlier than February 1st, 1901.

JED L. WASHBURN.

Subscribed and sworn to before me this 1st day of November, 1900.

WILLIAM D. BAILEY,
Notary Public, St. Louis County, Minn.

[Notarial Seal.]

SUPREME COURT
OF THE UNITED STATES.

OCTOBER TERM, A. D. 1900.

THE MIDWAY COMPANY,
PLAINTIFF IN ERROR.

VS.

FRANK W. EATON,
LEONIDAS MERRITT,
MERRILL M. CLARK,
RICHARD H. FAGAN AND
MARGARETHA LONSTORF,
DEFENDANTS IN ERROR.

Now come the defendants in error in the above entitled cause and, upon the foregoing affidavit, consent that the said

cause may be forwarded upon the calendar for hearing not earlier than February 1st, 1901.

Dated, November 1st, 1900.

CHAS. A. TOWNE,
Attorney for Defendants in Error, Frank W. Eaton and Margaretha Lonstorf.

JED L. WASHBURN,
Attorney for Defendants in Error, Leonidas Merritt, Merrill M. Clark and Richard H. Fagan.

OCT 11 1901
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

Brf. of Ayers for P.C.

OCTOBER TERM, 1900.

Filed Oct. 11, 1901.

THE MIDWAY COMPANY, Plaintiff in Error,

vs.

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN AND MARGARETHA LONSTORF, Defendants in Error.

No. 8

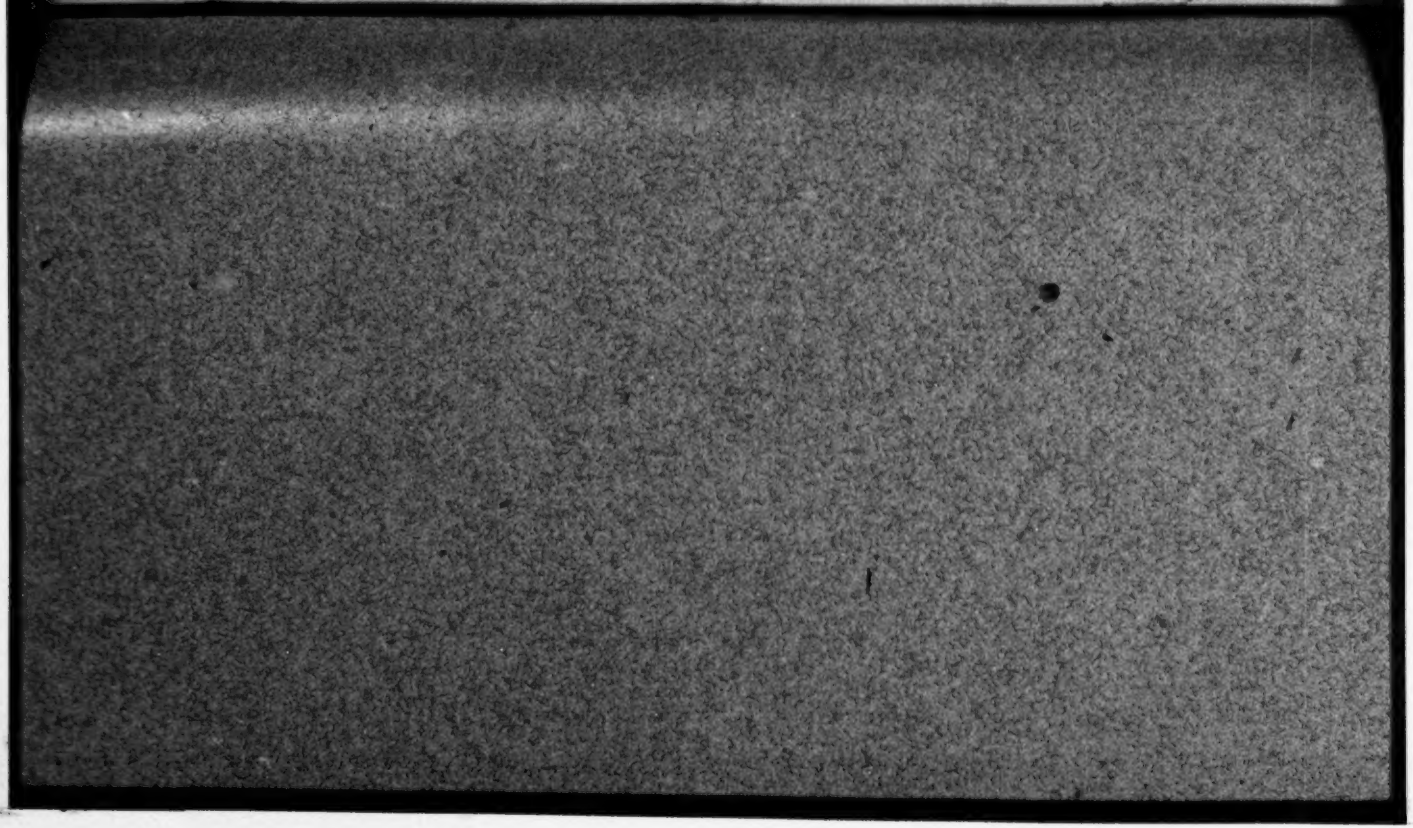
IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR PLAINTIFF IN ERROR.

WALTER AYERS,
Attorney for Plaintiff in Error.

P. H. SEYMOUR,
Of Counsel.

J. L. THWING,
BOOK AND COMMERCIAL PRINTER,
DULUTH, MINN.



INDEX TO BRIEF.

Statement of the case, - - - - 1–10

Questions Presented, - - - - 10–12

Assignments of Error, - - - 12–13

ARGUMENT. 13

I. History of Act of July 17th, 1854, in Congress, Land Department and Courts, State and Federal, - 15

(A) Legislative History of Act, - - 16–19

(B) Regulations of Land Department, - 19–20

(C) Decisions of Land Department, - 20–22

(D) Decisions of Supreme Court of Minnesota and other Courts, - - - 22–29

(E) Decisions of Supreme Court of United States, 30–32

II. Land Department had jurisdiction to cancel location. Patent necessary to convey legal title, - 32–34

III. Supreme Court of Minnesota could not enter on construction of act as new question, - 34–35

IV. The Findings of Fact of Secretary of Interior was final, - - - - - 35–41

V. If question a new one, Courts could not hold otherwise than as they have held. - 41–68

1. Language clear; construction unnecessary, 41

2. If interpretation necessary, rules stated. - 42

3. If ambiguity, Rules of Construction, - 42

(a) Character of Indian title, - - 44

(b) Indian in state of pupillage, - 45

(c) Policy of Government towards Indian, 45–50

(d) Policy of Government as to unsurveyed lands, - - - 50–51

(e) Extraneous circumstances, words, and subject-matter, - - - 51–68

VI. Must affirmatively appear that Eaton entitled to patent, - - - - 68–71

VII. Analysis of Decision of Supreme Court of Minnesota and answer to reasoning employed therein, 71–118

APPENDIX.

Appendix A. Act of July 17th, 1854, (bottom paging), 1–2

Appendix B. Amendatory Act of May 19th, 1858, - 3–4

Appendix C. Report accompanying Bill for Act of July 17th, 1854, - - - 5–27

Appendix D. Circular of March 21st, 1857, - 28–31

Appendix E. Circular of February 22nd, 1864, - 32–36

Appendix F. Form of Sioux Half-Breed Scrip, - 37–38

Appendix G. Decision in Felix vs. Carroll, - - 39–41

Appendix H. " " Murphy vs. Jones, - 42–44

Appendix I. " " Allen vs. Merrill, - - 45–56

Appendix K. " " Allen vs. Merrill, on review, 57–68

Appendix L. " " Hyde vs. Eaton, on review, 69–71

Appendix M. Brief for Appellant in Gilbert vs. Thompson.

Appendix N. Brief for Respondent in Gilbert vs. Thompson.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 312.

THE MIDWAY COMPANY, Plaintiff in Error.

vs.

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN, AND MARGARETHA LONSTORF, Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The action terminating in the judgment upon which the Writ of Error issued in this case was brought by the Midway Company, the plaintiff in error, as plaintiff, against Frank W. Eaton, Leonidas Merritt, Merrill M. Clark, Richard H. Fagan and Margaretha Lonstorf, defendants in error, as defendants in the District Court of St. Louis County, Minnesota, and was a statutory action to determine adverse claims to certain real estate, to-wit, three, 40 acre tracts de-

scribed as lots three, five and six, of section thirty, township sixty-three, north of range eleven west of the fourth principal meridian, according to the Government survey in said St. Louis County, Minnesota.

The plaintiff claims title under a patent issued by the United States, May 10th, 1898, to one Frank Hicks, from whom, subsequent to the entry of said Hicks but prior to the issue of the patent, the plaintiff purchased the lands in controversy, to-wit., on October 21st, 1897.

The defendants claim title under a certain location of Sioux Half-Breed scrip issued under the Act of Congress of July 17th, 1854 (10 Stat. 304) such location having been made by the said Frank W. Eaton on June 16th, 1883, upon lands then unsurveyed embracing those in controversy, the other defendants claiming under said Eaton. This location was cancelled in pursuance of a decision of the Hon. Wm. F. Vilas, Secretary of the Interior, dated February 18th, 1889 (unpublished) a copy of which is annexed to and made a part of the findings of the trial court; (Record pp. 63-81.)

The defendants, Merritt, Fagan and Clark joined in an answer (Record p. 4); the defendant Eaton answered separately (Record p. 307). The defendant Lonstorf stipulated that the answer of Merritt, Clark, and Fagan, should stand as her answer (Record p. 47). The answers of the defendants are identical in form and substance as to all material matters, and allege substantially that Eaton was the duly constituted agent of the Half-Breed; that substantial improvements were made upon the land in question, under the authority and for the benefit of the Half Breed; that all of the acts done in the location of the scrip were done by or on behalf of the Half-Breed, in order that she might acquire the lands in controversy to dispose of the same if she so desired; that she had never sold or assigned her scrip and that there was nothing in the record before the Secretary to justify his findings of fact.

The evidence adduced upon the trial was wholly documentary, consisting (aside from documents relating to chain of title, as to which there was no dispute) of the record before the Land Department, upon which was based the decision of the Secretary of the Interior.

The principal ultimate facts established by the decision of the Secretary are substantially that the Sioux Half-Breed scrip in question had been sold and disposed of by the Half-Breed, to some one unknown, accompanied by two powers of attorney executed in blank, one to locate the scrip, the other to sell the lands located upon. That Eaton purchased this scrip accompanied by the two blank powers of attorney for the purpose of using the same for his exclusive benefit, inserting therein his own name in the blank power to locate, as the attorney for the Half-Breed and that of his business partner, Leonidas Merritt, in the blank power of attorney, to convey, and after some improvements had been made upon the lands in question, then unsurveyed, by certain persons employed by Eaton, who were to have an interest in the land, Eaton, upon making the affidavit required by the rules and regulations of the Land Department "that said improvements were made under the personal direction of said Orillie Stram (the Half-Breed) and for her personal use and benefit," located the scrip upon the premises in question, and thereafter caused the lands located upon to be conveyed to himself and his employees or associates.

The Secretary further found that the whole transaction was, and was intended to be, for the purpose of enabling Eaton to use and acquire this scrip for himself and his associates in order that by means thereof he and his associates might acquire the lands in question; that Orillie Stram, the Half-Breed, had and was intended to have, no interest whatever in the matter; that she neither made nor had anything to do with the so-called improvements upon the premises;

that she had sold and disposed of the scrip, as such, using the device of two blank powers of attorney to accomplish that end, and that the affidavit made by Eaton, upon which the location of the scrip was allowed, was false. The Secretary refers to the case of Allen vs. Merrill (8 L. D. 207) decided by him on the same day, for the reasons in extenso, for his conclusions of law.

The findings of fact and conclusions of law of the trial court are found at pages 51-63 Record. Thereby the trial court finds that the findings of fact by the Secretary of the Interior above referred to were fully sustained by the evidence before him. (Record, page 59.) The decision of the Secretary also contained a statement of some minor or subordinate facts appearing from the record as follows:

1. That the improvements made by Eaton were "slight * * * * scarcely deserving of the name."

2. That the scrip in question "after many years and after passing through several hands" lodged in Eaton's hands.

3. That the Half-Breed had sold the scrip "long prior to the location."

4. That the scripee "never saw the land."

5. That the Half-Breed for a long time "directly and positively repudiated Eaton and Merritt as her attorneys in fact, denying that they acted for her in any capacity whatever."

These latter propositions the trial court finds were not sustained by the evidence before the Secretary, holding:—

1. As to the character of the improvements made by Eaton that they "consisted of a house about 14 by 16 feet in size."

2. That "it did not appear that the scrip referred to had passed through many hands or through any hands before coming into the hands of the said Frank W. Eaton."

3. "That it did not appear from the evidence before the said secretary that the said scripee never saw the land."

4. That it did not appear from the evidence before the said Secretary that she (the scripee) had "sold the said scrip long prior to the location thereof."

5. That it did not appear from the evidence before the said Secretary that "for a long time she (the scripee) directly and positively repudiated Eaton and Merritt as her attorneys in fact, denying that they acted for her in any capacity whatever."

6. That it appeared from the evidence that the powers of attorney to locate and convey were executed in blank by the Half-Breed "about one week before the location of the said scrip by the said Frank W. Eaton."

EVIDENCE BEFORE THE LAND DEPARTMENT.

Eaton's case as presented to the Land Department, by the testimony of Eaton himself, and that of his own witnesses disembarrassed of all conflict in the evidence, and of all minor questions, was as follows:

The defendant Eaton wish to acquire a valuable tract of unsurveyed land supposed to contain mineral, situate in the wilderness about one hundred miles to the northeast of the city of Duluth.

One Edward Byrne, who was by occupation an explorer of mineral lands, together with one Clement, who followed the same occupation, in or about the first part of May, 1883, discovered that the lands embraced within what when surveyed would be section 30, contained valuable deposits of iron ore. Both Byrne and Clement were at the time of the discovery, and for some eighteen months previously had been in the employ of the Minnesota Iron Co., for the purpose of exploring for minerals. So far as appears the fact

of this discovery was never communicated to the Minnesota Iron Co., but Byrne came to Frank W. Eaton at Duluth, who was in partnership with one Leonidas Merritt, under the firm name of Eaton & Merritt, and told Eaton of his discovery. Eaton thereupon employed Byrne to go to this land, furnishing him with money and provisions, and make a homestead settlement, with the agreement that when the title had been secured he (Byrne) the ostensible homesteader, should receive one-third of the land. Eaton instructed Byrne to hold possession of the lands by force; Byrne associated two other persons with him, Clement and one Power, under the agreement that each, for aiding him in his homestead claim, should receive one-third of the one-third that Byrne was to receive from Eaton. These three persons, Byrne, Clement and Power, went to the land in question and made the improvements which afterwards served as the basis for the location of the Half-Breed scrip hereinafter referred to. They staked out the lands and put the words "Homestead Claim" on the stakes. They put the same words on the shanties they erected. They patrolled the land with guns to keep other settlers off, "under Eaton's direction." Meanwhile Eaton, who had no scrip at the time he sent these homestead settlers to the land, began to negotiate for some, and from one Byron M. Smith, a broker and dealer in scrip, in Minneapolis, he bought two pieces of Sioux Half-Breed scrip, accompanied by two powers of attorney, one to locate, the other to sell the land after location, both executed in blank as to the name of the attorney and the description of the land. He then sent an employee, one Richard H. Fagan, a defendant in this case, to get a description of the land and of the improvements being made by the homesteaders, and after filling in his own name in the power to locate as well as the description of the land, he went to the land office, produced his power to locate as attorney for the Half-Breed and made the affidavit required

by the rules of the Land Department that "said improvements were made under the personal direction of said Orillie Stram and for her personal use and benefit." Whereupon the location was allowed. Thereupon Eaton immediately sent the defendant Fagan and Leonidas Merritt, his business partner, to the land to call off the homesteaders, the scrip having been located, and they immediately came away from the land and abandoned the so-called improvements which consisted of two shanties without chimneys or fireplaces, without windows other than holes cut in the logs, the doors being hung on leather hinges; which shanties had never been inhabited up to the time the homesteaders left and never were afterwards, being immediately allowed to fall into decay. Upon the arrival of the homesteaders in Duluth, Eaton, having filled in or caused to be filled in, the name of his business partner, Leonidas Merritt, in the power to convey caused him to convey to the homesteaders their agreed interests in the land and caused him to convey to himself, Eaton, the balance. The Indian never saw the land or had anything to do with it; she never saw Eaton until March 31, 1886, and Eaton himself never saw the land. (See testimony of Eaton and Byrne, Record pp. 108 and 117.) He both bought the scrip and located the same upon the lands for his own exclusive benefit and that of his associates in the enterprise and the Indian was to have no interest whatever in it. This, Eaton himself testified to, in the following language: "I made the improvements under the supposition that when he conveyed to me her scrip and power of attorney to locate the same for a valuable consideration and the further contract on her part for a valuable consideration to fully confirm all my acts and also the acts of Leonidas Merritt, her attorney in fact, for the purpose of conveying the lands located under and by virtue of said

Half-Breed scrip, that all her rights to any land as far as she was concerned was thereby transferred." (Folio 336.)

And in response to the following questions he testified as follows:

Q. Then you located those pieces of scrip for the purpose, through them, of obtaining title to the lands they should cover, yourself? A. My intention was to have an interest in it. I did not expect to have the whole.

Q. Who else did you expect to have an interest? A. Mr. Merritt, Mr. Fagan and Mr. Byrne, that is all. (Folio 332.)

Eaton also testified that he agreed with Byrne in consideration "of the land proving valuable as he represented to me, and in consideration of his erecting or causing to be erected for me valuable improvements on two locations of one hundred and sixty acres each, that I would pay his expenses necessarily incurred in doing the work, that I would locate the scrip upon the land and as soon thereafter as the location was completed I would cause to be conveyed to him an undivided one-third interest in the land." (Folio 697.) Eaton had no scrip at that time. (Folio 715.)

The judgment entered in conformity with the findings of fact and conclusions of law of the trial court (Record 302-4) adjudged that Eaton and his co-defendants were the owners of the lands in controversy; that the plaintiff had, at the best, a bare legal title thereto under the patent from the United States, which title, if any it had, it was adjudged to hold in trust for the defendants.

The case was heard by the trial court and submitted in June, 1899, and the findings of fact and conclusions of law above referred to were filed on the 27th day of December, 1899. Attached to the findings of fact and conclusions of

law was a memorandum consisting of eight printed pages (Record 86-94) in which the trial court gives its reasons for its decision, but in which no mention is made of the fact that the location in question was upon unsurveyed lands. On December 30th, 1899, the court filed a detached paper consisting of twenty-six printed pages entitled "A memorandum" in the case in question in which the court argues the correctness of its conclusions at great length, adverts for the first time to the fact that the location in question had been made on unsurveyed lands, and presents additional reasons for its decision.

This second memorandum is found in the Record at pages 275-301.

A case showing the evidence adduced upon the trial was duly settled, allowed and made a part of the record (p. 272). The only portion thereof needing consideration under the findings is the testimony before the Land Department and such part of the record and exhibits before that department as were introduced in evidence before the trial court. This evidence before the Land Department is found at pages 108-128 and pages 199-266 of the Record and it over-laps in part, a transcript of the testimony of the witnesses Eaton and Byrne, having been introduced by the plaintiff as Exhibit "B." (page 107) and a transcript of the testimony of all of the witnesses before the Land Department including that of Eaton and Byrne having been introduced by the defendants as Exhibit 2. (Record, pages 197-266.)

From the judgment so as aforesaid rendered against the plaintiff and in favor of the defendants, the plaintiff appealed to the Supreme Court of the State of Minnesota, by whom, in pursuance of its decision filed May 16th, 1899, final judgment was rendered on May 29th, 1899, affirming in all things the judgment of the trial court.

On June 4th, 1899, a Writ of Error to the Supreme Court of the United States to review the judgment aforesaid, was allowed and issued.

While the case at bar involves but three forty-acre tracts of land, it is a test case to determine the validity of the title to the whole three hundred and twenty acres located by Eaton, as set forth in the decision of the Secretary, the title to all of which under the patent from the United States government is in the plaintiff in error, Eaton and his co-defendants claiming title to all thereof under the scrip locations. The matter of the title to this land has been in litigation before the Land Department and before the courts, State and Federal, for more than sixteen years, and decisions affecting the rights of various claimants to the same or portions thereof will be found not only in the unpublished decision of the Secretary, a copy whereof is annexed to the Findings, but in the following cases:

Hyde et al. vs. Eaton et al., (on Review) 12 L.D. 157.

McDonald et al. vs. Hartmann et al., 19 L. D. 547.

McDonald et al. vs. Hartmann et al., 20 L. D. 324.

Germania Iron Company vs. U. S. 165, U. S. 379.

Germania Iron Company vs. James, U. S. C. C. of Appeals, 89 Federal Reports, 811.

Midway Co. vs. Belden, 98 Federal Reports, page 23.

The questions presented and necessarily involved in the consideration of the correctness of the judgment in question are:—

First. Whether the clause in said act of July 17th, 1854, "and, provided further, that no transfer or conveyance of any of said certificates or scrip shall be valid" restricted alienation thereof by the Half-Breed beneficiary and pro-

hibited acquirement thereof by a purchaser in advance of location, for the purpose of locating the same for his own benefit.

Second. Whether a device whereby a person purchases such scrip from a broker or third person, accompanied by two blank powers of attorney, one to locate the scrip and the other to convey the lands after location, who afterwards fills up the blanks and locates the scrip upon unsurveyed lands, the whole transaction in the matter of acquiring the scrip and locating the land, being confessedly for the sole benefit of such person and his associates, to whom he causes the lands after location, to be conveyed by means of the other power of attorney, is an evasion of the provisions of the Act of Congress of July 17th, 1854, relating to the non-assignability or transfer of the scrip in question or as to the location thereof upon unsurveyed lands.

Third. Whether the clause in said act designating the classes of lands upon which said scrip may be located and allowing its location "upon any other unsurveyed lands upon which they (the Half-Breeds) have respectively made improvements" requires any improvement whatever by the Half-Breed as a condition precedent to a valid location, and whether if said clause does require such improvements they can be made by a third party, who, having purchased the scrip, attempts to locate the same upon unsurveyed lands for his own benefit.

Fourth. Whether the mere adjustment of the boundaries of a location upon unsurveyed lands to the lines of the government survey, after the filing of the plat thereof in accordance with the rules of the Land Department, operated to purge the location of any fraud or invalidity attaching to it and by such adjustment make it a location as of surveyed lands.

Fifth. Whether the Land Department had the jurisdiction to inquire into the matter of any fraud or invalidity in the location of the scrip in question and to cancel the location upon proof of the existence of such fraud or invalidity.

Sixth. Whether the findings of the Land Department upon questions of fact are conclusive.

Seventh. If an act of Congress relating to the public lands has been understood, applied and enforced in a particular manner for the period of forty-six years by the Land Department and the Courts, State and Federal, including the Supreme Court of the United States, in accordance with what the courts have declared to be the clear import of its language, upon the faith of which property rights have been acquired, is a court at liberty to enter upon the construction of the act as a new question.

Eighth. Whether in this case, the question being a purely Federal one, was the State court bound to follow the decisions of the Supreme Court of the United States in Felix vs. Patrick (145 U. S. 317) and Carter vs. Ruddy (166 U. S. 493).

ASSIGNMENTS OF ERROR.

The plaintiff in error assigns as error in the judgment of the Supreme Court of the State of Minnesota:

1. The court erred in holding that the Land Department of the United States had no authority to cancel the locations of the Sioux Half-Breed scrip, issued under the Act of Congress, approved July 17th, 1854, and under which locations the defendants in error claim title.

2. The court erred in holding that the plaintiff in error holds the title derived under the patent issued by the United States, for the premises in controversy in said action, in trust for the defendants in error.

3. The court erred in holding that the defendants in error were and are the owners of the premises in controversy in said action.

4. The court erred in holding that the findings of fact of the court below justified its conclusions of law.

5. The court erred in holding that the title to the premises in controversy in this action, passed to Orillie Stram, nee Moreau, by virtue of the location of Sioux Half-Breed scrip, under which the defendants in error claim title.

6. The court erred in not holding that the findings of fact of the Secretary of the Interior, set forth and embodied in his decision of February 18th, 1889, were final and conclusive.

7. The court erred in not holding that the findings of fact of the Secretary of the Interior, set forth and embodied in his decision of February 18th, 1889, were sufficient to warrant and sustain the action of the Land Department of the United States in cancelling the Sioux Half-Breed scrip locations under which the defendants in error claim title.

8. The court erred in affirming the judgment of the court below.

9. The court erred in not reversing the judgment of the court below and directing judgment for the plaintiff in error and against the defendants in error, as prayed in its complaint.

ARGUMENT.

At the outset we assert that each controlling question in this case has been answered by the Supreme Court of the United States as clearly and emphatically as it is possible for any question to be answered and our position is, that the Supreme Court of the State of Minnesota was bound

without question and without argument, to follow those decisions of this court as the law of the land so declared by the highest tribunal. These decisions, Felix vs. Patrick, 145 U. S. 317 and Carter vs. Ruddy, 166 U. S. 493, declared respectively the policy of the act in question as evidenced by its clear language, affirmed the supervisory power of the Land Department and pronounced a transaction whereby a person attempts to acquire, by means of two blank powers of attorney, scrip issued under the act in question as a fraud upon the Indian; against the letter and the policy of the law, and a palpable device to evade the provision of the law against the assignment of the scrip. In the case of Felix vs. Patrick the decision related to a location made in 1861 upon surveyed lands and at a time when no affidavit was required, (as in 1864 and subsequently,) that the reservee is living and that the location is made for her sole use and benefit; the case at bar related to a location upon unsurveyed lands requiring improvements by the Half-Breed and also proof that they were made by her and for her sole use and benefit.

The Supreme Court of Minnesota has not even referred to these decisions; it has completely ignored them as well as the law which they established and declared, and in so doing we respectfully submit that the rights of the plaintiff in error under the law and under the Constitution, have been violated, the Constitutional guaranty being of the right to have the law of the land as declared and announced by the proper tribunal, administered without regard to the views of the court administering such law; and that a refusal to so administer the law constitutes a denial of justice. As the Supreme Court of Minnesota has, however, both ignored and over-ruled these decisions and in the argument in support of its views has stated various propositions, and because also of the wide range of the argument of counsel for defendants in their briefs in the court below, we shall

present all of the authorities or matters in anywise bearing upon the act in question, which authorities will be found to establish the following proposition:—

I.

THAT NEITHER IN THE MINDS OF THE COMMITTEE ON INDIAN AFFAIRS WHO DRAFTED THE BILL IN QUESTION AND PRESENTED IT TO CONGRESS WITH THE REASONS FOR ITS PASSAGE, NOR IN THE MIND OF THE CONGRESS THAT PASSED THE BILL IN QUESTION AND THE SUBSEQUENT AMENDATORY ACT OF MAY 19TH, 1858, NOR IN THE LAND DEPARTMENT OF THE UNITED STATES OR COURTS, STATE AND FEDERAL, INCLUDING THE SUPREME COURT OF MINNESOTA, AND THE SUPREME COURT OF THE UNITED STATES COVERING A PERIOD OF FORTY-SIX YEARS FROM THE PASSAGE OF THE ACT IN QUESTION AND DOWN TO THE TIME OF THE DECISION OF THE SUPREME COURT OF MINNESOTA, COMPLAINED OF, IN MAY 1900, HAS THERE EVER BEEN A QUESTION AS TO THE MEANING OR OBJECT OF THE CLAUSE AGAINST THE ASSIGNABILITY OF THE SCRIP OR RELATING TO ITS LOCATION UPON LANDS EITHER SURVEYED OR UNSURVEYED; THAT ON THE CONTRARY, THE LANGUAGE OF THE ACT HAS NEVER BEEN CONSIDERED SUSCEPTIBLE OF MORE THAN ONE MEANING WHICH HAS BEEN UNIFORMLY GIVEN TO IT, VIZ: THAT THE RIGHT TO ACQUIRE PUBLIC LANDS BY MEANS OF THIS SCRIP, WAS A PURELY PERSONAL RIGHT IN THE ONE TO WHOM THE SCRIP ISSUED.

(A.)

The legislative history of the Act of Congress of July 17, 1854, and the reasons for its passage with particular reference to the clause against the assignability of the scrip issued thereunder and requiring improvements by the Half-Breed as a condition precedent to its location upon unsurveyed lands.

The act in question was known as H. R. No. 338 and was favorably reported to the first session of the Thirty-third Congress, April 28, 1854, (H. Rep. No. 138) by Daniel B. Wright from the committee on Indian Affairs. Which report also embodied a report of the Department of the Interior from the office of Indian Affairs dated March 4, 1854, made by George W. Manypenny, Commissioner. We quote from the report, at page one, of the Committee on Indian Affairs:—

> "The Indian titles to the whole of the country surrounding said reservation are now extinguished, and the bands to which said surrounding country belonged have removed westward, and many of the less cultivated of said Half-Breeds are desirous of disposing of their interest in said reserve and following their Indian relatives. Some have already gone. Justice, humanity and sound policy alike second their desire; for all experience demonsrates the utter incompatibility of the uncivilized Indian with civilized life. Many of them, however, are represented as being educated, and having judgment and experience sufficient to take care of their own interest. A number of them are said to be men of much intelligence, possessing property, and having become citizens of Minnesota and the adjoining States.. Some of them have served in the legislature and filled offices of honor and trust in the Territory, while others are engaged in agriculture, mercantile and other profitable pursuits. With them, at least the object of the fostering policy of the Government has been attained, in

fitting them for civilized life; for, in point of intelligence and civilization, many of them would compare favorably with their white brethren."

We also quote from the report of Commissioner Manypenny at pages 11 and 12:—

"I am informed that many of the Half-Breeds are very competent to manage their own affairs, and that they have good improvements on the reserve. It is said that others are altogether incompetent to take care of property. Some of the thrifty Half-Breeds, it is said, have gone off of the reserve, and bought land and made improvements; being unwilling to do so on the reserve, because they could not have land assigned to them in severalty.

No good can result to the Half-Breeds by the continuance of this occupancy in common. Some legislation will, in my opinion be necessary before a change can well be made, if for no other purpose than to protect the interests of such portion of these people as are incompetent to manage their own affairs.

Whether the executive discretion be exercised, and the land set apart in severalty, or the proposal to issue scrip in lieu of the land be adopted, *some legislative provision to guard the interests of the incompetent will be necessary.*—(A copy of the report quoted from is annexed to this Brief as Appendix C.)

Proceeding now to the history of the bill before Congress we find the following explanation made in the House by Mr. Wright on behalf of the Committee on Indian Affairs when the bill was under consideration there. See Congressional Globe, part two, 1854. Page 1114.

We quote from his explanation as follows:—

"The first provision of the bill, it will be observed, authorizes scrip to be issued to Half-Breeds who were entitled to it under the treaty of Prairie

du Chien of May 15, 1830, upon condition that they made a relinquishment to the Government of the United States, under such form as may be prescribed, of all the interest they possess in that reservation.

It will also be observed by the committee, that there is no power under the bill to dispose of that scrip. *The object of the Committee of Indian Affairs in reference to that was to prevent the Half-Breeds from being imposed upon in the disposition of their land. The committee was fully aware that the moment the patent issues the power of disposal attaches.*

The bill also secures to the Half-Breeds the right of pre-emption. This is thought proper in order to secure the interests that were intended to be conferred on the half-breeds of the Sioux Tribes of Indians."

An inquiry having been made as to why an exchange of land is made for scrip, Mr. Wright answered:

"For the reason that you can only obtain the objects contemplated in the treaty by such a provision. *They are those who have moved beyond the limits of Minnesota, and who occupy their farms, who are cultivating them and are not residents within the limits of Minnesota Territory. The object of the bill is to give these Half-Breed Sioux scrip, so that they can avail themselves of the benefit of their own labor by securing the lands upon which they have settled.*

"In addition to this I would say that this bill opens up the reservation for settlement by white citizens within its limits.

"And for the information of the Committee I would say, that it is only the most civilized of the Half-Breeds who have remained there. Those who have preferred uncivilized life and Indian habits have gone beyond the limits of the reservation. They are, however, entitled to the benefits secured or intended to be. Hence the provision in the bill authorizing them to receive scrip. *But in order to induce them to take care of their rights the bill provides that they cannot dispose of their scrip until they have located it; and as I stated before, when the patent is*

issued to them, then they shall have the power of disposing of their land, and of receiving the benefits to which they are entitled."

(B.)

Rules and Regulations of the Land Department.

The rules and regulations of the Land Department relative to Sioux Half-Breed scrip and the location thereof are found in the circulars of the following dates:—

March 21st, 1857, 1 Lester, 627.

Feb. 22nd, 1864, 2 Lester, 307.

Jan. 29th, 1872, 1 Copp's L. L. 723.

May 28th, 1878, 5 C. L. O., 126.

We annex to this brief as Appendices D. and E. respectively, copies of the circulars of March 21st, 1857, and February 22nd, 1864.

The provisions of the circulars of January 29th, 1872, and May 28, 1878, are sufficiently quoted from in the decision of Secretary Vilas in Allen vs. Merrill, 8 L. D. 207.

The circular of 1857 provides, among other things, that the "scrip must be located in the name of the party in whose favor the scrip is issued and the location may be made by him or her in person or by his or her guardian or duly authorized agent."

Attention is called in this circular to the unassignable character of the scrip and that transfers of the same are held void. With reference to the location thereof on unsurveyed lands the circular provides "That when the scrip may be located upon unsurveyed lands * * * * on which the Half-Breed has improvements * * * * * * * his application for location should be accompanied by a diagram and description denoting the natural objects and

distances so as to fix with certainty the exact locality wanted, served as the best notice in our power to settlers that confusion may be avoided and enable him when the public surveys are made, to designate the legal sub-division embracing the location."

The circular of 1864 provides among other things, in addition to the provision quoted by Secretary Vilas in Allen vs. Merrill the following requirement:—

"5th. When not located by the Reservee in proper person the application must be accompanied by the affidavit of the agent, that the Reservee is living and that the location is made for the sole use and benefit of said Reservee."

The form of scrip issued under the act in question was furnished by the Commissioner of the General Land Office (see Report of Commissioner of the General Land Office, November 26th, 1856, Part I., Messages and Documents, 1856-57, page 214). A copy of this form is appended to this brief as Appendix F.

It contains at the very head, the words "NOT TRANSFERABLE OR ASSIGNABLE" and the closing paragraph is as follows:—

"THIS certificate or scrip is not by law transferable and any assignment or conveyance of the same is therefore void."

(C.)

Decisions of the Land Department relating to locations of Sioux Half-Breed Scrip.

These decisions in order of date are:

Felix vs. Carroll, Mch. 27, 1863, unpublished.

Murphy vs. Jones, June 29, 1876, unpublished.

Allen vs. Merrill, Feb. 18, 1889, 8 L. D. 207.

Allen vs. Merrill, on Review, Jan. 28, 1891, 12 L. D. 138.

Hyde vs. Eaton, on Review, Jan. 28, 1891, 12 L. D. 157.

McGregor vs. Quinn, April 5, 1894, 18 L. D. 368.

Strong vs. Pettijohn, Aug. 20, 1895, 21 L. D., 111.

Missoula Elec. Light Co., Oct. 11, 1895, 21 L. D. 306.

John W. Poe, Nov. 16, 1899, 29 L. D. 309.

We annex to this brief as appendices G. H. I. K. and L. respectively, copies of the decisions in Felix vs. Carroll, and Murphy vs. Jones and of so much of the decisions in Allen vs. Merrill, Allen vs. Merrill (on review) and Hyde vs. Eaton (on review), as relates to the scrip locations.

The propositions embodied in these cases are thus stated in various of the Syllabi.

"Sioux Half-Breed scrip is intended by the statute as evidence of a purely personal right in the Half-Breed to locate and receive patent for the number of acres named therein, and cannot be used as a means to secure title to lands except for the sole benefit of the Half-Breed himself.

A location made by one acting in his own interests, and not for the use and benefit of the Half-Breed, is in contravention of the statute under which the scrip is issued.

The right to locate this scrip on unsurveyed land can only be exercised where the Half-Breed has made improvements on such land, and the improve-provements in such case are a condition precedent to the location, and must be made for the use and benefit of the Half-Breed."

"A location of Sioux Half-Breed scrip, made without improvement of the land by or on behalf of the Half-Breed and in the interest of parties to whom the scrip had been assigned by double power of attorney, is invalid."

(D.)

Decisions concerning the Act in question by various courts, including the Supreme Court of the State of Minnesota.

Gilbert vs. Thompson, 14 Minn., 544 (Gil. 414), 1869.

In this case it appears that the United States had patented lands to a certain Half-Breed upon the location of her scrip and the Half-Breed patentee had conveyed the land to two different persons at different times, one conveyance having been made after the patent issued and the other having been made under a power of attorney, executed by the Half-Breed to one Benjamin Lawrence after the scrip issued but before the location thereof. A reference to the paper books and briefs shows that the scrip was located in 1857 upon surveyed land. The plaintiff claimed title from the Half-Breed by virtue of a deed executed by her in 1867 after the patent of the United States to her. The defendant claimed title under a deed executed in pursuance of the power of attorney given by the Half-Breed prior to the location of the scrip and mesne conveyances.

The plaintiff offered to show that the power of attorney under which the defendant claimed was a part of a transaction between the Half-Breed and one Foster whereby by means of two powers of attorney it was sought to evade the provision against the assignment of the scrip and to enable Foster to acquire the scrip for his own benefit.

The first question presented for determination was the character of the right evidenced by the scrip in question. Plaintiff's counsel argued from the language of the act and referred to a decision (not reported) of the Circuit Court of the United States, Mr. Justice Miller presiding, decided

at June Term, 1867, holding, that the right evidenced by the scrip was personal in the one to whom the scrip issued.

Defendant's counsel argued that the clause against the assignability of this scrip (1) did not prohibit the alienation of the land to be acquired therewith or an agreement by the Half-Breed to convey it before location; (2) that the clause in question simply required that the scrip should be located in the name of the Half-Breed; not necessarily for his benefit. That the object of the provision was substantially to save trouble and confusion in the Land Department in the matter of looking into the validity of assignments of the scrip, citing Camp vs. Smith, 2 Minn., 155.

The Court speaking by Mr. Chief Justice Gilfillan, upon this point, says: (The italics being our own.)

> "The Act of Congress of 1854, under which Sioux Half-Breed scrip was issued, provides 'That no transfer or conveyance of any of said certificates or scrip shall be valid.' *It was the intention of Congress that the right to acquire public lands by means of this scrip should be a personal right in the one to whom the scrip issued*, and not property, in the sense of being assignable; but no restraint is imposed upon the right of property in the land *after it is acquired* by location of the scrip. In the scrip itself the Half-Breed had nothing which he could tranfer to another, but his title to the land, *when perfected under it*, was as absolute as though acquired in any other way. It follows that any attempt to transfer the scrip, directly or indirectly, would be of no effect as a transfer. *The title to the scrip* would remain in him, and *the title to the land* acquired by it would vest in him just as though no such attmept had been made. Such attempt to transfer would not involve any moral turpitude, nor the breach of any legal duty, as is the case with an attempt to transfer a preemptive right. It would be simply ineffectual because the scrip is not transferrable.

"A power of attorney, so far as intended to "operate as a transfer, would be of no avail; the "right of the Half-Breed in the *scrip and land* "would remain the same; it could not be made *irrevocable, nor create any interest in the attorney.*"

The second question presented for determination was whether the policy of Congress, being as declared, parole evidence, was admissible to show the intent of the parties in executing the powers of attorney, and the court held that such evidence was inadmissible upon the ground that the power to convey "could not be varied by parol proof that the parties had an intention not expressed in it."

In this case it will be noted (1) That a patent had been regularly issued by the Government and the case had passed beyond the jurisdiction of the Land Department of the United States.

(2) That neither the Government nor the Half-Breed was a party to the action and that during the period of ten years intervening between the location of the scrip and the beginning of the action the land in controversy had been in the possession of various persons who had improved the same and was, when the action was begun, in the possession of the defendant who held under a contract of sale from one, Buchard, who had purchased from one, Richards, who had purchased in 1857, by deed executed by Benjamin Lawrence as attorney for the Half-Breed.

As this case will be referred to subsequently in this brief in connection with the decision of the Supreme Court of Minnesota, complained of, we have procured and annexed hereto as Exhibits M. and N. printed copies of the briefs of counsel for the respective parties in the case above cited.

Thompson vs. Myrick, 20 Minn. 205; (Gil. 184;) (1873.)

In this case the contest arose between two parties, one of whom had entered into a contract to cause the conveyance of certain land which was to be located with Sioux Half-Breed scrip to another party, such other party agreeing to pay twenty-eight hundred dollars ($2800.00) for such land and giving his note to the first party at the time the agreement was entered into; the said first party at that time having a power of attorney to locate land for the Half-Breed, owner of the same, located the same and the patent was issued by the United States Government to the Half-Breed. Thereafter such party caused or induced the Half-Breed to convey the land acquired by him under the patent to other persons, among them the wife of such other first party. The action was brought to enforce the performance of the contract to convey the lands.

Neither the Government nor the Half-Breed was a party to the action and the only question was as to the enforceability of the contract. The court refers to and adopts the construction placed upon this act by the Land Department of the United States, citing the circular letter contained in 1 Lester Land Laws, 628, and says:—

> As the scrip was made non-assignable by the Act of Congress, (10 Stat. at Large, 304), and therefore no valid transfer or conveyance of the same could be made, Myrick's relation to the scripees was that of an attorney in fact, duly authorized to locate the scrip for them. So far as the location is concerned, there is no ground for supposing that it was not made prudently, and for the best interests of Myrick's (the attorney's) principals. So far as appears in this case, Myrick's duty in his fiduciary relation to the scrippees was at an end when the location was complete. As this relation was to end upon such location, we can conceive of no reason why Myrick was not at liberty, either before or after the location was made, to enter into an agreement to secure the title (inuring from

the location) to the plaintiff upon payment of an agreed consideration. Such an agreement did not, so far as this case shows, tend to produce a conflict between Myrick's private interest and his duty to locate the scrip to the best advantage of his principals. * * * * * * * * * *

In this case it will be observed that the patent had been issued to the Half-Breed and so far as appears held for the benefit of the Half-Breed who had full control of the land embraced therein and who by his own deed voluntarily conveyed the same after patent issued.

Coursolle vs. Weyerhaeuser, et al., 69 Minnesota, 328, (1897).

This action was brought by a Half-Breed to recover certain land which he claimed he had wrongfully been deprived of by means of the device of two powers of attorney, one to locate and one to convey, against the policy of the Act of Congress, July 17, 1854. It appeared that the Half-Breed had rested quietly for seventeen (17) years or more after location and 10 years or more after patent issued, although with full knowledge of all the facts and of his own acts. The court decided the case upon the ground of laches and estoppel by conduct. In the last paragraph of the syllabus the court says:—

"Facts considered, and held that the plaintiff is estopped by his conduct from asserting that a deed of land entered with his Sioux Half-Breed scrip is void because executed before the land was entered."

The Court says at page 334:—

There is no express finding that the transaction of 1870 was a device to transfer the scrip, although, perhaps, that might be necessarily in-

ferred from the fact actually found. It may also be conceded that, if it was such a device, any deed executed for the purpose of carrying it into effect could be avoided in a proper action for that purpose against any grantee chargeable with notice of the facts * * * * * * * * * *

If the transaction between plaintiff and Dorr in 1870 was a device to effect a transfer of the scrip, there is no finding that defendants had any notice of that fact. * * * * * * * *

Dole vs. Wilson, 20 Minn. 356 (Gil. 308.)

This case while it relates to scrip issued under the seventh clause of paragraph 2 of the Chippewa treaty of September 30, 1854, (10 Stat. 1109), refers to and has a bearing upon the act in question.

The Court says at page 311:—

The complaint stating that the scrip was issued in pursuance of the treaty, it is to be presumed that the entries, which according to the complaint, the parties named in the scrip were thereby authorized to make, were entries of land "to be selected by them," in the language of the seventh sub-division; that is to say, the privilege of each Half-Breed to *select* 80 acres of land was a personal right, and therefore the scrip issued as evidence of the right, was non-assignable. And it was accordingly held by the General Land Office that transfers of the scrip were void, and that a certificate could only be located in the name of the Half-Breed, in whose favor it was issued. 2 Lester, Land Laws, 371-4. But, as held with reference to the Sioux Half-Breed scrip in Gilbert vs. Thompson, 14 Minnesota, 544, (Gil. 414) the transfer of the certificates would not be illegal, but only ineffectual and void, as a transfer of the title to the same. * * * * * * * *

It is possible that the defendant may be able to plead and prove facts, showing that the transactions between plaintiff and defendant were not only evasive, but subversive of the policy of the government, under the treaty before mentioned. Whether such showing would not be overcome by proof of the issue of the patents by the United States, and of the execution of the deeds by the Half-Breeds, is a question which suggests itself, but upon which we express no opinion.

It will thus appear from the Minnesota cases that the policy of the act of Congress has been uniformly recognized, and that there has been no difference of opinion as to the meaning of its language; that a purely personal right in the Indian was intended to be conferred thereby, and that in each and every case the question arose after the issuance of the patent; that neither the Government of the United States, nor, except in the last case where the plaintiff was barred by laches and estoppel, the Half-Breeds were parties to the action, and the validity of the location was not assailed by either of the parties who had any right to assail the same, viz; the Government of the United States or the Half-Breed.

The Court in more than one of these cases referred to the fact that the Government had issued its patent for the land and the question of the validity of the location had been determined by the proper tribunal, viz; the Land Department of the United States, whose adjudication the Court refused to disturb.

But while the court in two of the cases has stated that there was no moral turpitude involved in the attempt merely to assign the scrip, neither this Court nor any other has said that there was no moral turpitude involved in a location which rested upon perjury as the location in this case as a matter of fact did, and as it had to rest in order to be al-

lowed under the rules and regulations of the Land Department, which had been continuously in force since 1864; nor has this court, or any other court, said that a location so made would be valid or not open to question by the United States either before issuance of patent in the Land Department or in the courts upon complaint of the United States even after issuance of patent if meanwhile the land had not gone into the hands of innocent third parties and the fraud had not been discovered until after it had passed beyond the jurisdiction of the Land Department.

We may also refer to two cases, U. S. vs. Chapman, 5 Sawyer, 528, S. C. Fed. cases, 25-407, and Rose vs. Wood & Lumber Co., 73 Cal. 385, touching upon the act in question.

In U. S. versus Chapman, the court says:—

> "The defendant, had attempted to locate the same (Sioux Half-Breed scrip) on this land in 1866 before the United States survey of the land. Inasmuch as the Indian or Half-Breed never lived on the land or resided in the state, the land being then unsurveyed, no such location could then legally be made."

In Rose versus Wood and Lumber Company, the court says at page 388:—

> "In all cases where it has been the intention of Congress to prevent alienation by the beneficiary, such intention has been clearly expressed. Thus the act of Congress of 1854 under which the Sioux Half-Breed scrip was issued, provided expressly that no transfer or conveyance of the certificate should be valid."

(E.)

Decisions of the Supreme Court of the United States.

Felix vs. Patrick, 145, U. S. 317.

In this case the question of the language and policy of the Act of Congress of July 17th, 1854, and the character of the right evidenced by the scrip issued thereunder, was directly considered as the first point in the case.

While the bill contained an allegation of fraud in the matter of acquiring the scrip from the Half-Breed, this point was treated as a matter of minor importance and the court said concerning it "The allegations of the bill do not satisfy us that she did not receive full value for her scrip. * * * * * It is evident that she intended to part with the scrip to some one." And held,

1. That the device of a blank power of attorney and quit-claim deed was doubtless resorted to for the purpose of evading the provision of the act of Congress, that no transfer or conveyance of the scrip issued under said act should be valid.

2. This rendered it necessary that the scrip should be located in the name and for the benefit of the person to whom it was issued.

3. That the scheme was a palpable device to evade the law against the assignment of the scrip.

4. That a person taking these instruments while still in blank was chargeable with notice that they were intended as a device to evade the law against the assignment of the scrip.

5. That such person had no right to locate such scrip for his own benefit.

6. That a trust would be impressed upon lands acquired by making use of facilities intended for the benefit of another.

7. That Congress had recognized the dependent condition of the Indian and their hopeless inability to withstand wiles or cope with the power of the superior race, in various ways, among others in making their scrip non-assignable as in this case.

8. That the defendant bought the scrip and located it in violation of the letter and policy of the law.

In this case the location was made in 1861 upon surveyed land and before the requirement of an affidavit, under the rules of 1864. Patent issued in 1863.

Fee vs. Brown, 162, U. S. 602.

This case, while it related to Chippewa Half-Breed scrip issued under the treaty with the Chippewas of Sept. 30, 1854, (10 Stat. 1109), which provided for the selection of eighty acres of land by the Half-Breed which should be "secured to them by patent in the usual form," is distinctly in point in the present case. There are no express restrictions on alienation of the right, to evidence which, certificates of identity known as Chippewa Half-Breed scrip, were issued. This court held, that the scrip certificates were intended to be located only by the Half-Breed to whom they were issued and patents were to be issued to the persons named in those certificates, and consequently the right to alienate the land was not given until after the issue of the patent.

After adverting at length to the manner of evading the law by means of two blank powers of attorney, the court

says "Of course this scheme was in the nature of a fraud upon the act."

II.

THE LAND DEPARTMENT OF THE UNITED STATES HAD JURISDICTION TO INQUIRE INTO THE MATTER OF ANY FRAUD OR INVALIDITY IN THE LOCATION OF THE SCRIP IN QUESTION, AND A PATENT WAS NECESSARY TO CONVEY THE LEGAL TITLE.

This jurisdiction in the matter of the cancellation of locations of Sioux Half-Breed scrip has been exercised by the Land Department without question ever since the issuance of Sioux Half-Breed scrip. It was recognized and affirmed after full discussion and examination by the Supreme Court of Minnesota in Monette vs. Cratt (1862) 7 Minn 234, (Gil. 176). And the following decisions of the department or of the courts, either direct cancellation of locations of Sioux Half-Breed scrip or refer to and recognize cancellations made by the department.

Allen vs. Merrill, 8 L. D. 207 (on Review) 12 L. D. 138.

Hyde vs. Eaton (on Review), 12 L. D. 157.

Walter Bourke case, 12 L. D. 105.

Cyr vs. Fogarty, 13 L. D. 673.

McGregor vs. Quinn, 18 L. D. 368.

Strong vs. Pettijohn, 21 L. D. 111.

Missoula Elec. Light Co., 21 L. D. 306.

John W. Poe, 29 L. D. 309.

Murphy vs. Jones, decided June 29th, 1876.

Eaton vs. Hyde, decided Feby. 18th, 1889.

John F. McGee, referred to in 14 L. D. 523.

Coursolle vs. Weyerhaeuser, 69 Minn. 328.

U. S. vs. Chapman, 5 Sawyer, 528.

Chapman vs. Pollock, 11 Pac. Rep. 767.

As to the effect of such a long unquestioned exercise of the power, see authorities cited *infra*.

The department has authority at any time before a patent is issued to inquire whether the original entry was in conformity with the act of Congress.

Hawley vs. Diller, 178 U. S. 476.

Orchard vs. Alexander, 157, U. S. 372.

Michigan Land & Lumber Co. vs. Rust, 168 U. S. 589.

Knight vs. United Land Assoc., 142 U. S. 161.

In the latter case the Court say:

"The phrase, 'under the direction of the Secretary of the Interior,' as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the secretary to supervise and control the extensive operations of the Land Department, of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of Congress or under treaty stipulations respecting the public domain, the Secretary of the Interior is the supervising agent of the Government to do justice to all claimants and preserve the rights of the people of the United States. * * * The secretary is the guardian of the people of the

United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case, involving the surveying and disposal of the public lands."

A certificate of location of Sioux Half-Breed scrip conveys at best but an equitable title. A patent is necessary to convey the legal title.

Carter vs. Ruddy, 166 U. S. 493.

III.

THE SUPREME COURT OF MINNESOTA WAS NOT AT LIBERTY TO ENTER UPON THE INTERPRETATION OR CONSTRUCTION OF THE ACT OF JULY 17TH, 1854, AS A NEW QUESTION.

Unless it is clear that the interpretation or construction given to an act by the officers of the Land Department for so long a period is erroneous it cannot be over-turned.

U. S. vs. Johnston, 124 U. S., 236, 253.

U. S. vs. Philbrick, 120 U. S. 52-59.

Hahn vs. U. S., 107 U. S. 406.

Hawley vs. Diller, 178 U. S. 476.

If the act was ambiguous the settled construction given to it from the time of its passage to the present date is conclusive.

Edwards vs. Derby, 12 Wheat. 206.

Brown vs. U. S. 113 U. S. 568.

U. S. vs. Burlington, 98 U. S. 341.

Nat. Bank vs. Whitney, 103 U. S. 99.

U. S. vs. Moore, 95 U. S. 763.

U. S. vs. Alabama R. R., 142 U. S. 621.

McPherson vs. Blecker, 146 U. S. 27.

The uniform decisions of the courts, state and federal, declaring the clear meaning of the language, as well as the policy of the act in question and in entire harmony with the decisions of the Land Department, carry this case in any possible event far beyond the requirements necessary to bring the same within the rules relating to the decisions of the Land Department unsupported by judicial decision.

In the case at bar the Supreme Court of the United States as well as the Supreme Court of Minnesota, in its previous decisions and all other courts, have said that it was clear that the officers of the Land Department were right; the Supreme Court of Minnesota, in the decision complained of, says, refusing to inquire and ignoring authority, that it is clear they were wrong. We think that we may be spared further discussion as to whether the meaning of the language and the policy of the act referred to was an open one for the Minnesota Court.

IV.

THE COURT ERRED IN NOT HOLDING THAT THE FINDINGS OF FACT OF THE SECRETARY OF THE INTERIOR SET FORTH AND EMBODIED IN HIS DECISION OF FEBRUARY 18TH, 1889, WERE FINAL AND CONCLUSIVE.

The trial court as well as the Supreme Court of Minnesota, found or held that Eaton was the duly constituted attorney for the Half-Breed. The Secretary of the Interior

found that Eaton was not the duly constiuted attorney of the Half-Breed or her attorney at all. That the guise of attorney-ship or agency was merely adopted by Eaton for the purpose of evading the provisions of the act of Congress. Whether the question be regarded as one of pure fact or of mixed law and fact, is immaterial. If the question of intention became material in deciding upon the question, the evidence of the intention was before the Secretary in the testimony of Eaton himself to say nothing of the testimony of the other witnesses, and the question of intention is one of fact.

U. S. vs. Quincy, 6 Peters, 446.

The decision of the Land Department upon questions of fact is conclusive.

Catholic Bishop vs. Gibbon, 158 U. S. 155 and cases cited.

The trial court found that all of what may be regarded as the material findings of fact found by the Secretary of the Interior were justified by the evidence before him; but found that in certain specified particulars the facts as found by the Secretary were either not supported by the evidence before him or were otherwise than as found by him. (See statement of case.)

Neither the trial court nor the Supreme Court of Minnesota treat these minor or subordinate matters, which the Court finds were not supported by the evidence before the Secretary, as of any importance in their decisions. The main facts as found, by the Secretary's decision, remain as they must, uncontroverted. We desire to show, however, that even as to these minor or subordinate facts the secretary was warranted in his findings by the evidence before him, and as the Supreme Court of Minnesota has simply found that the findings of the lower court were supported by the evidence before it, we shall find it convenient to dis-

cuss these minor or subordinate findings by means of the assignments of error made in the Supreme Court of Minnesota to the findings of the trial court as shown at page 351 of the record, remarking at the outset that it is difficult to separate some of the so-called findings of fact specified in the assignments of error, from conclusions of law, which the so-called findings specified in the 1st, 2nd, 3rd, 4th and 5th assignments of error, obviously are. Thus the errors in the 1st, 2nd and 3rd assignments of error may be regarded as pure matters of law.

With reference to the fourth assignment of error relating to the finding that there was not when the said scrip was located on said unsurveyed land, nor at any other time, any valid adverse claim to said lands whatever, it has already been shown that the Government at all times had a valid adverse claim to said lands, and with reference to any valid claim of third persons it appears that if no such valid claim existed, it was rendered impossible by the unlawful and forcible possession of said premises by Eaton, until by reason of his procuring the location of the scrip herein by means of a false affidavit he succeeded in segregating the land from the public domain so that no right or entry could attach thereafter. In other words, Eaton with reference to adverse claims of third persons puts himself in the position of taking advantage of his own wrong in order to secure the benefit to himself.

The fifth assignment of error is directed to the reasons as stated by the Court for the decision of the Secretary of February 18, 1889, and the reasons as given by the Court, especially the one assigning the fact, that the Half-Breed had not had personal contact with the land, are so at variance with the letter and spirit of the Secretary's decision, which is made a part of the findings, that we need do no more than refer to it.

With reference to assignment of error five and half the evidence before the Secretary need be but glanced at, to show that his findings in the matter of the improvements made by Eaton's employes upon the premises in question were amply justified; that the so-called house was never intended or fit for human habitation and was abandoned as soon as built, and these facts are entirely in line with the view which the Court takes of the matter as expressed in its memoranda, that it was quite immaterial whether there were any improvements made upon the lands or not.

With reference to the sixth assignment of error, which relates to the finding by the Court that it did not appear by the evidence before the Secretary that the scrip in question had passed through many hands or through any hands before coming in to the hands of said Eaton, it may first be remarked that it is utterly immaterial how many hands the scrip had passed through, the only question being whether the policy of the statute had been evaded by the transfer of the scrip whenever and howsoever made. The Secretary, however, did not make this finding carelessly, for the counsel in their argument before him in the Eaton case had called the attention to the fact that this self same scrip had, prior to the month of October, 1880, been delivered to Lewis Merrill, who, claiming to act as attorney in fact for the scripee, in October of that year, at Miles City, in the then Territory of Montana, filed the same with the United States Land officers and located the same upon certain lands, and that subsequently on the 15th day of May, 1882, Merrill withdrew this scrip from the Land Office at Miles City. All of the files in the Department relating to the scrip were referred to by counsel in their brief and, the Secretary unquestionably examined the same, the facts being undisputed, although these files were not formally introduced in evidence in the Eaton case, the same being matter of record

in the Secretary's own department of which he probably felt he could take judicial notice.

As to the 7th assignment of error, we find nothing in the evidence to sustain the tenth finding of fact that the powers of attorney to said Frank W. Eaton were executed by the said Stram about one week before the location of the said scrip by the said Frank W. Eaton. The testimony of Eaton himself is that he got this scrip from Byron M. Smith of Minneapolis, receiving the same by mail in the latter part of May or the first of June, but this point is immaterial.

With reference to the 8th assignment of error which relates to the fact found that it did not appear from the evidence before the Secretary of the Interior that the said scrippee never saw the lands, it seems to us that the court has allowed itself to fall into a mere verbal criticism of the Secretary's decision, for there was no proof that the Half-Breed ever had in fact seen the land or that she was interested in seeing it or in anything about it. In fact it appears that Eaton himself never even saw the land and did not know whether the Half-Breed had ever done so or not, and the testimony of all of the witnesses who were upon the land say that they had never seen any Half-Breed there. This finding of fact then is as we say a mere verbal criticism of the Secretary's decision, unless the mere circumstance that by some chance or mischance the Half-Breed happened to have been at some time in a position where the land came within the range of her vision affected the merits of this case. The finding is certainly utterly immaterial. Certain it is that the Half-Breed never saw the land in connection with the so-called improvements or the location or in anywise in her own interest. She had in fact no interest in seeing the land, for her interest had been acquired or attempted to be acquired by Eaton, who was the only interested party in the matter.

With reference to the ninth assignment of error, which relates to the fact found by the Court that it did not appear from the evidence that the scripee had sold the scrip long prior to the location thereof, we deem this another instance of a purely verbal criticism of the Secretary's decision and think the point immaterial. The point is whether the Half-Breed had sold the scrip prior to the location, and while as a matter of fact it appeared to the Secretary that she had sold the same long prior to the location, the length of time whether one hour, or ten years is not important.

With reference to the tenth assignment of error, which relates to the fact as found that it did not appear from the evidence before the said Secretary that for a long time the scripee directly and positively repudiated Eaton and Merritt as her attorneys in fact, denying that they acted for her in any capacity whatever, we have only to refer to the affidavit made by the Half-Breed filed in the Eaton case in connection with the contest instituted by Hyde and forming a part of the record. This repudiation, however, was a mere circumstance and could not affect the validity of the location if the same was not in fact made for the exclusive use and benefit of the Half-Breed. It would make no difference whether she repudiated or affirmed the act which was invalid at the time of its performance because in contravention of the policy of the law. Public lands cannot be misappropriated by and invalid entry for the benefit of persons not entitled to the same and the same invalidity then be cured or rather effectuated by the means adopted in this case, and in no event could the Half-Breed confer upon others by ratification or otherwise the right to lands to which she herself was not entitled by reason of the fact that the requirements of the law had not been complied with.

It will thus appear that the Secretary's findings of fact upon all material points are fully sustained and the court

expressly so finds. The ultimate fact for the decision of the Secretary was as to whether Eaton's transaction concerning the scrip, taken as a whole, was a device to evade the policy of the act of Congress in question. The Secretary found as a matter of fact that it was. His finding on the matter of fact is conclusive and the court does not seriously attempt to controvert it. The only possible escape then from the action of the Department would be by reason of the fact that there was no such policy of the Act in question. It is upon this proposition alone that the findings and judgment of the court below must and do rest.

V.

IF THE QUESTION WERE A NEW ONE, NEITHER THE SUPREME COURT OF MINNESOTA NOR THIS COURT COULD HOLD OTHERWISE THAN AS THEY HAVE DONE IN THE CASES OF GILBERT VS. THOMPSON AND FELIX VS. PATRICK, RESPECTIVELY, AS TO THE MEANING OF THE LANGUAGE EMPLOYED IN THE ACT IN QUESTION AND THE POLICY OF CONGRESS EVIDENCED THEREBY.

1. The words employed in the act are perfectly clear both as to the clause against the assignment of the scrip "and provided further, that no transfer or conveyance of any of said certificates or scrip shall be valid" and as to the location of the scrip upon any other "unsurveyed lands * * * * * * * upon which they have respectively made improvements." These words are so clear that there is no necessity for construction, the aid of which is invoked only when ambiguity appears.

Lake County vs. Rollins, 130 U. S. 670.

2. If, however, the act needs interpretation that interpretation will be from the words used and the subject-

matter to which it relates, in order to discover the reason as well as the meaning of particular provisions.

McKee vs. U. S., 164 U. S. 293.

Ency. of Law, Vol. 23, page 322, and cases cited.

3. If the act is ambiguous and needs the aid of construction there is not the slightest difficulty in ascertaining the policy which Congress intended to embody in the act, "not by conjecture or roaming at large upon the boundless fields of speculation" but by reference to the report accompanying the bill and the explanation offered of its purposes by the chairman of the committee who presented the bill to the house sitting as a committee of the whole.

We quote from Holy Trinity Church vs. U. S., 143, U. S. 457-463:

> "Again another guide to the meaning of a statute is found in the evil which it is designed to remedy and for this the court properly looks at contemporaneous events, the situation as it existed and as it was pressed upon the attention of the legislative body."

See also,

U. S. vs. Freight Association, 166 U. S. 290, page 358.

Elk vs. Wilkins, 112 U. S. 118.

The amendatory act of May 19th, 1858 (11 Stats. 292) being in *pari materia* may also be referred to.

By the second section of said act it was provided,

> "That the provisions of this act shall not extend to any tract or subdivision, within the body of land aforesaid, which shall have been settled upon in good faith by, and is in the occupancy of, any of the said Half-Breeds or mixed bloods; which lands, so settled upon and occupied by the Half-Breeds, are hereby expressly declared to

be subject to no other disposition than location by the 'certificates or scrip' authorized to be issued by the said act of eighteen hundred and fifty-four, for *the benefit of said Indians.* Nor shall the provisions of this act extend to any lands which may have been located prior to its passage with Half-Breed scrip, with the consent of the settlers thereon."

If Congress contemplated that this scrip was assignable and therefore supposedly floating around the country in the hands of speculators or located elsewhere upon the public lands of the United States, it follows:—That neither the white man nor the Half-Breed could ever get title to the lands so settled upon or in occupancy by any of the said Half-Breeds or mixed bloods upon the ceded territory. If the Indian in occupancy of land upon the reservation had parted with his scrip, which had been located elsewhere, he was without means to acquire title, and if the scrip had been validly located elsewhere it was exhausted. If on the other hand Congress contemplated that any Half-Breed occupying lands upon the reservation had scrip which must belong to him because its ownership could not be parted with, the provisions of this act of May 19th, 1858, were intelligible; otherwise they are not.

Again in Hamilton vs. Rathbun, 175 U. S. 414-419. This court says:—

> "The general rule is perfectly well settled that where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induce the act in question, the mischiefs intended to be remedied, the extraneous circumstances and the purpose intended to be accomplished by it, to determine the proper construction."

Under these rules we may not only interpret the act from the words used and the subject-matter in order to dis-

cover the reason of particular provisions as well as the meaning conveyed by the words used, but if necessary we may go to the legislative history of the act, ascertaining the reasons pressed upon the legislature for the passage of the bill, may consider the evil designed to be remedied, the situation as it existed at the time of the passage of the act and other matters referred to in the foregoing rules.

We shall now consider various other matters having a bearing upon the interpretation of the act in question, if it needs interpretation.

(a). The character of the title conveyed to the United States by the Half-Breed in lieu of which the scrip was issued.

The Half-Breeds occupied the Lake Pepin Reserve under the provisions of Article 9 of the Treaty of July 15, 1830, Vol. 7, Stats., page 330, which is in the following words:— "The Sioux bands in council having earnestly solicited that they might have permission to bestow upon the Half-Breeds of their nation the tract of land within the following limits (describing the same) the United States agree to suffer said Half-Breeds to occupy said tract of country, they holding by the same title and in the same manner that other Indian titles are held."

The Sioux Half-Breeds occupied the Lake Pepin Reserve holding the same as other Indian titles were held, that is to say, in common, the right being one of occupancy merely, which could be conveyed by the Indian to no one but the United States, and which might be disposed of by the United States even without their consent.

Jones vs. Meehan, 175 U. S. 1-8 and cases cited.

U. S. vs. Four Bottles, 90 Fed. 720.

Johnson vs. Mackintosh, 8 Wheaton, 543-604.

U. S. vs. Cook, 19 Wall, 591-594.

Spalding vs. Chandler, 160 U. S., 394-407.

Mo. K. & T. Ry. Co. vs. Roberts, 152 U. S. 114.

All that the Half-Breed conveyed to the United States for the scrip was their Indian title which was extinguished before the scrip was delivered.

(b). The relation which the Indians occupied to the Government of the United States resembles that of guardian and ward. They are in a state of pupilage.

Cherokee Nation vs. State of Ga., 5 Peters 1.

Jones vs. Meehan, 175 U. S. 1.

(c). The general policy of the Government with reference to the Indians, whether of full or mixed blood, has been from the first to render the Indian self-supporting, to induce him to take lands in severalty and to cultivate that land; to make improvements thereon and to protect him in those improvements; to educate him in the arts of civilization and to make at least a herdsman or agriculturist of him as the first step in the civilizing process rendered inevitable by the pressure of the white population upon what was formerly wholly Indian territory, and upon the success or failure of this policy depended the preservation or extinction of the Indian race.

To be more specific let us turn for illustration in support of this proposition in its various branches, to the treaty with the Red Lake and Pembina bands of Chippewa Indians, 13 Statutes, 667-691, referred to and discussed in Jones vs. Meehan, 175 U. S., 1. Article 5 of that treaty reads as follows:

> "To encourage and aid the chiefs of said bands in preserving order and inducing, by their example and advice, the members of their respective bands to adopt the habits and pursuits of civilized life, there shall be paid to each of the said chiefs annually, out of the annuities of the said

bands, a sum not exceeding one hundred and fifty dollars, to be determined by their agents according to their respective merits. And for the better promotion of the above objects a further sum of five hundred dollars shall be paid at the first payment to each of the said chiefs to enable him to build for himself a house."

Article 8, with the Senate amendment thereto, reads as follows:

"In further consideration of the foregoing cession, it is hereby agreed that the United States shall grant each male adult Half-Breed or mixed-blood who is related by blood to the said Chippewas of the Red Lake or Pembina bands, who has adopted the habits and customs of civilized life and who is a citizen of the United States, a homestead of one hundred and sixty acres of land, to be selected at his option, within the limits of the tract of country hereby ceded to the United States, on any land not previously occupied by actual settlers or covered by prior grants, the boundaries thereof to be adjusted in conformity with the lines of the official surveys when the same shall be made, and with the laws and regulations of the United States affecting the location and entry of the same."

"Provided, that no scrip shall be issued under the provisions of this article, and no assignments shall be made of any right, title or interest at law or in equity until a patent shall issue, and no patent shall be issued until due proof of five years' actual residence and cultivation, as required by the act entitled 'An Act to secure homesteads on the public domain.'"

As an illustration of the extreme care exercised by the Government in protecting the Indians in the improvements which they have made upon ceded territory, we may refer to the treaties with the Pillager Chippewas of February,

1855, 10 Statutes, 1156; with the Winnebagoes of February 27th, 1855, 10 Statutes, 1172, each of which contains the provision that "such of the mixed-bloods as are heads of families and now have actual residences and improvements in the ceded country, shall have granted to them in fee, eighty acres of land to include their respective improvements." Substantially the same provision will be found in other treaties wherever there has been any improvement or residence on the part of an Indian, of the whole or mixed blood, in the ceded territory to call for protection. As illustrative of the policy of the Government to encourage the Indian to make improvements and to adopt the habits and customs of civilized life, we need refer to but a few of the many treaties evidencing such intention. Take for instance the treaty of March 15th, 1854, with the Ottoes and Missourias, 10 Statutes, 1038; and with the Omahas, March 16th, 1854, 10 Statutes, 1043; with the Shawnees, May 10th, 1854, 10 Statutes, 1053; with the Dwamish Indians, January 22nd, 1855, 12 Statutes, 1; with the Wahkas, 12 Statutes, 13; Wallawallas, January 9th, 1855, 12 Statutes, 19; the Yakamas, 12 Statutes, 25; and other treaties in said Vol. 12, from pages 31 to 39, all of which Treaties contain a provision substantially that the "President may, from time to time at his discretion, cause the whole of the land herein reserved * * * * to be surveyed off into lots and assigned to such Indian or Indians of said * * * * * tribes as are willing to avail themselves of the privilege and who will locate on the same as a permanent home, for a single person over twenty-one years of age, one-eighth of a section, to each family of two, one-quarter of a section, etc. * * * *." In all cases provision for restriction, in some form, of the right of alienation, is found.

Turn to the treaties with the Saxs and Foxes, of May 18th, 1854, 10 Statutes, 1075, which provide that the "President may assign to each person or family desiring it, such

quantity of land as in his opinion will be sufficient for such person or family with the understanding that he or they will occupy, improve and cultivate the same." The treaty with the Winnebagoes of February 27th, 1855, 10 Statutes, 1172, provides in the 4th Article as follows:

"In order to encourage the Winnebago Indians to engage in agriculture and such other pursuits as will conduce to their well-being and improvement, it is agreed that at such time or times as the President may deem advisable, the land herein provided to be selected for their future home or such portion thereof as may be necessary, shall be surveyed, and the President shall from time to time, as the Indians may desire it, assign to each head of the family or single person over twenty-one years of age, a reasonable quantity of land * * * * * * for their separate use, etc."

As illustrative of the care which Congress has exercised in protecting the Indian in all of his improvements, whether within or without the reservation, we may refer to the treaty with the Shawnees of May 10th, 1854, 10 Statutes, 1053; with the Kaskaskias, May 30th, 1854, 10 Statutes, 1083; with the Wyandottes of January 31st, 1855, 10 Statutes, 1159, all of which contain in some form the provision "each allotment to the Indians in severalty shall be made so as to include the houses, and as far as practicable the other improvements of each person or family.

It will be useless to do more than refer, as we have done, to a few of the treaties illustrative of the general policy of Congress towards the Indians, and when we contemplate further the provisions for the support and maintenance of Indian schools, Indian farms, Indian farmers and various other educational institutions and appliances of civiiization referred to in the various treaties, it seems strange that it should be deemed necessary or advisable by

the counsel for defendants to question the existence of the policy of Congress with reference to Indians, whether of the full or of the mixed-blood. The most that can be said is, that some tribes are further advanced in civilization than others and that the Half-Breeds or mixed-bloods are further on the path of civilization than the full-bloods of their tribe. And it may be that this is in part, at least, owing to the fostering policy of the Government towards them. In some cases the restrictions on alienation are slight; in others they extend absolutely for a period of twenty-five years and at the expiration of such time may even be extended by the president. In other cases the restriction on alienation may be removed when on investigation it is found that the Indian is found competent to manage his own affairs, and in some cases an investigation has been instituted in advance for the purpose of ascertaining who of the Indians or Half-Breeds were competent, and such competency having been ascertained and reported, land has been assigned to them in severalty with absolutely no restrictions on the right of alienation.

Such a case is found in the treaty with the Poncas of March 12, 1858, 12 Statutes, 65, whereby it is provided in Article 3 as follows:

"But to those who have chosen and left the tribe to reside among the whites and follow the pursuits of civilized life, viz., Charles Leclaire, Fort Piere, N. T.; Cillaste Leclaire, Pottowattomie, K. T.; Ciprian Leclaire, St. Louis, Missouri; Julia Harvey, Omaha, N. T.; Jenny Ruleau, Sioux City, Iowa; David Leclaire, Amelia Deloge, and Laura Deloge, at the Omaha mission, there shall be issued scrip for one hundred and sixty acres of land each, which shall be receivable at the United States Land offices in the same manner, and be subject to the same rules and regulations, as military bounty land warrants." Military bounty land warrants were assignable under the provisions of the act of

Congress of 1852. It may be noted in passing that nearly all of the treaties referred to were negotiated on behalf of the Government by George W. Manypenny, the Indian Commissioner, who presented the report in connection with the presentation of the act of July 17, 1854, to Congress.

(d). The policy of the Government with reference to unsurveyed lands.

The only cases in which the Government allowed occupation of unsurveyed lands has been in favor of persons actually settled upon such lands, making permanent and bona fide improvements, residing thereon for a specified length of time and who were under a disability to convey or make any contract to convey any right acquired by virtue of their settlement, and even they could only acquire a conditional or inchoate right. The whole policy of the Government with reference to unsurveyed lands has been to allow no right to be acquired in them except by bona fide settlers, for whose protection and benefit the pre-emption and homestead laws were passed.

The provisions of the homestead law (passed in 1862) did not give the right to settle upon unsurveyed lands until 1880 (Section 3, Act of May 14th, 1880, 21 Stat. 140). Under the provisions of the pre-emption law no general right was recognized in a settler to occupy unsurveyed lands until 1862. At the time of the passage of the act of Congress in 1854 there was no right whatever to settle upon unsurveyed lands by either pre-emptor or homesteader in Minnesota nor anywhere except in California, and even there the act allowing settlement upon such lands was temporary and expressly limited in duration for a short period of one or two years.

See—

Buxton vs. Traver, 130 U. S. 232, at page 235.

Atherton vs. Fowler, 96 U. S. 513, at page 517.

Johnson vs. Towsley, 13 Wal. 72, at page 88.

Webster vs. Luther, 163, U. S. 331.

It will be seen from the foregoing that with reference to unsurveyed lands a highly personal privilege was conferred upon the Indian not at that time existing in favor of white persons, and which has never to the present day been extended to any but bona fide settlers upon the public lands for the purpose of protecting them in their improvements and encouraging them to make homes thereon. And by the act in question the Indian was neither encouraged nor induced to go upon unsurveyed lands but the simple promise was held out to them that should he improve such lands the government would protect him in such improvements by allowing him, but no one else, to acquire the lands so improved.

The two clauses respectively requiring improvements upon unsurveyed lands by the Indian and prohibiting assignment of the scrip reinforce each other if possible and serve to mark the highly personal character of the privilege conferred.

(e). The act considered in the light of extraneous circumstances its words and subject-matter.

One of the first matters in the mind of Congress and one which was being continually called to its attention, was the known improvidence of the Indian and especially with reference to scrip or land warrants of which when issued the Indian was always defrauded.

This is the representation made to Congress by the Secretary of the Interior, December 5th, 1853, at the very session at which the bill in question was passed, and just prior thereto.

We quote from page 61 of part 1 of Messages and Documents, 1853-4:

"The issue of warrants to Indians under the bounty land laws has been suspended; and, unless Congress expressly authorizes it, they will hereafter be disallowed. * * * * They are, moreover, in a state of pupilage; the Government is their guardian and bound to protect them against the superior intelligence and sagacity of the white man. Although many warrants were issued previous to the question being brought to my notice, it may be safely assumed that, with the exception of a few of the Stockbridges, scarcely a solitary entry has been made by an Indian under the scrip, or warrant issued to him. There is no positive proof of the fact; but it is the belief of those who have diligently inquired into it, that wherever scrip or warrants have been issued to individual Indians, they have been defrauded of them. If they are entitled to any such gratuity, sound morality, as well as justice to them, requires that some legal and different provision be made."

We refer also to the circular of instructions issued by the Commissioner of Indian Affairs to agents, of October 2, 1856 (see part 1, Messages and Documents, 1856-7, page 828):

"Sir: For the protection of the rights of Indians, for whom military bounty land warrants have been issued, against improvidence and fraud, the following regulations are prescribed for your Government in all sales and assignments thereof by them within your agency.

"Your certificate of the acknowledgment of any sale or assignment, when made by the person named in the warrant, should set forth that the assignor came personally before you, and was known by you to be the identical person described in the warrant, or that he was made known to you as such by the affidavit of some creditable and disinterested person who is known to you and who has not acted as the agent or attorney of the party, (which affidavit should be returned to this office)

that after having the meaning and purport of the assignment interpreted and fully explained to him, he freely acknowledged the execution of the same, and was satisfied and content with the consideration paid him therefor; and that he made such acknowledgment without the circumvention or undue persuasion of the purchaser or any other person.

The consideration should be paid or delivered in your presence at the time of making the acknowledgment, and the fact so stated, and the amount thereof set forth in your certificate, and that the assignor was capable of managing and taking care of his own affairs; that the consideration paid was a full and fair price for the warrant assigned, and equal to its market value at the time and place of sale; and, generally, that the sale was in all respects just and proper. * * * * * * * * * Many impositions will, it is feared, be attempted to be practiced upon the Indians in connection with their bounty lands, and you cannot exercise too much care in protecting them against such practices."

Considering the act with reference to the words used and the subject-matter to which it relates, we observe that the subject-matter of this act was, as to the thing to be given or issued under it, scrip or a certificate of identity, (the form of which we have annexed to this brief as an appendix), as a means to secure lands to the Indian. The beneficiaries were Indians and one of the classes of lands upon which the scrip might be located, upon certain conditions, was unsurveyed lands. The scrip entitled the person to whom it was issued, (the very object of its issue being to identify the proper claimant) to locate lands. It was a means to acquire lands and without which the land could not be acquired, nor could it be acquired even with the scrip, except upon certain conditions as to unsurveyed lands. All assignments, transfers or conveyances of the same are

expressly made void. As, without the means to locate there could be no location, the scrip, furnishing the sole evidence of the right to locate, being a certificate of identity, the provision against alienation compelled the scrip to remain in the hands of the original holder, the scrip being neither land nor an interest in land, but the mere evidence of a personal privilege to acquire land, which might or might not be exercised.

It was not a grant in *praesenti*. Even after a valid location an equitable title at best was obtained.

The Half-Breeds gave no lands to the United States; they owned none; they relinquished simply their Indian title. The act in question did not effect an exchange of lands. It gave the Indian the means to consummate an exchange of land for his Indian title and simply provided that he should not be deprived of this means. Congress exercised its supervision and duty as guardian up to the time when the exchange was actually effected. As the Indian relinquished his right to the lands in the reservation Congress proposed to see that he got something more than a slip of paper in exchange; to see that he actually got lands which the scrip might entitle him to, as such. It might be that the Half-Breed who followed the wilder portions of his tribe to the west might never use this scrip or need the lands to which he might entitle himself by a proper use thereof, or it might be that after many years and becoming gradually more civilized he might need to avail himself of the provision which Congress by means of this scrip had made for him. By the clause against the assignment of the scrip, thus making the right conferred a purely personal privilege, congress was performing its moral duty by attempting to at least secure to the Indian, lands which might furnish him with a means of subsistence in exchange for his right in the reservation which he had relinquished and also by thus providing a homestead and means of sup-

port through its cultivation, relieving itself of the expense of caring for and maintaining the Indian at the same time that it encouraged him to adopt the habits of civilized life. The necessity of a personal selection by the Indian in the exercise of a personal right evidenced by the scrip involved the choice of a tract of land to be located with the scrip. This involved the exercise of judgment both as to its intrinsic value and its particular adaptation with reference to location and otherwise for his personal use and when it came to the sale of the land he was selling something tangible, with the value of which he might be supposed to be acquainted in a much greater degree than with that of a mere commercial instrument which might be parted with improvidently in accordance with his known traits, for the tithe of its value or a drink of whisky or other similar consideration.

The scrip could be located upon unsurveyed lands by the Indian only in case he had made improvements upon the same. The policy of the Government with reference to unsurveyed lands has been referred to. It is not too much to assert that on the face of the act and without calling in the aid of construction, Congress did not intend to put in the hands of the Indians an instrument which from its experience it knew would be, as was said by Secretary Vilas in his decision in the Merrill case, a mere means whereby speculators would be enabled to acquire unsurveyed lands of the United States and also would not result in conferring upon the Indian the benefit intended.

By giving a certificate of identity with a clause against alienation the case is the same as if land had been given with a restriction on alienation. In such case it could not be successfully contended that although the legal title to the lands could not be parted with the beneficial interest could be transferred by an agreement to convey or other-

wise, which would be given effect after the restriction on alienation had expired or been removed.

Nor is the case different from what it would have been had a promissory note been given to the Indian by the Government in payment for a relinquishment of such title as he had, with a clause against assignment or transferring the same.

In such case we do not believe that it could be successfully urged that this did not prohibit an assignment of the debt evidenced by the note.

The case would not be similar to that of Myers vs. Croft, 13 Wallace 291, which related solely to the law relating to pre-emption rights, providing "that all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void."

The right referred to was the pre-emption right, that is the privilege of purchasing Government lands upon which the pre-emptor had settled, cultivated and improved at the minimum price. There seems to have been a considerable difference of opinion among the various courts in constructing this provision, until it was finally decided by the Supreme Court of the United States in Myers vs. Croft, and they decided it with a view to the policy of the act. They say:

> "Looking at the language employed, as well as the policy of Congress on the subject, it would seem that the interdiction was intended to apply to the right secured by the act and did not go further. * * * This right was valuable and independently of the legislation of Congress assignable. The object of Congress was attained when the pre-emptor went with clean hands to the Land Office and proved up his right and paid the Government for his land. Restriction upon the power of alienation after this would injure the pre-emptor and conserve no important purpose of public policy."

And in Quinby vs. Conlan, 104 U. S., 420, in commenting on this decision the court says:

> "The court held—looking at the purpose of the prohibition—that it did not forbid the sale of the land after the entry was effected, that is after the right to a patent had become vested, but did, applied to all prior transfers. The policy of preventing speculation through the instrumentality of temporary settlers would otherwise be defeated."

The differences between that case and the case at bar will be noted:

1. It applied to white men, *sui juris* and amply competent to take care of themselves.

2. That in construing the provision the court carefully considered the policy of Congress in connection with the language.

3. That in making a distinction between the land and the right secured by the act, the court recognized that the pre-emptor by virtue of his settlement upon the land in question had segregated the same from the public domain and acquired certain inchoate rights to a defined, specific tract of land which when dwelt upon and improved in accordance with the policy of Congress to people its vacant lands, gave him a right to purchase the same. The right as to the particular tract of land after the purchase had been made, was absolute and perfect and could be defeated in no manner whatever; it was a vested right in the land. In the case at bar the Sioux Half-Breed had no right in any land until the scrip was located. After that time, that is after a valid location, and until the patent issue, the Sioux Half-Breed had a vested right in land as such and during this period only, is there any analogy between the right of the Half-Breed and that of the pre-emptor and in all cases where the word land is used, either in decisions of the courts or in the various acts of Congress, the language refers to some

specific tract of land appropriated or segregated or in some manner defined by at least a possessory or inchoate title.

In the case at bar, until the location, the Half-Breed had no possessory title or inchoate title or any title whatever to land as such.

Nor would such cases as Doe vs. Wilson, 64 U. S. 457, and Crews vs. Burcham 66, U. S. 352, which relates solely to grants or reservations in *praesenti* of lands to certain Indian chiefs with no restrictions express or implied upon alienation, have any bearing on this case.

These cases and similar ones are reviewed and their result stated in Jones vs. Meehan, 175 U. S. 1, at page 21 in the following paragraph:—

> "The clear result of this series of decisions is that when the United States in a treaty with an Indian tribe, and as part of the consideration for the cession of the tribe of a tract of country to the United States, make a reservation to a chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States, by a provision of the treaty, or of an act of Congress have expressly or impliedly prohibited or restricted its alienation."

And in the first paragraph of the syllabus the court thus expresses itself:

> "A good title to parts of the land of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of Congress, or any patent from the executive authority of the United States. The question in

every case is whether the terms of the treaty are such as to manifest the intention of the parties to make a present grant to the persons named."

The scrip in question did not evidence a present grant of land and there was an express restriction against alienation.

In a word, under the treaty referred to in Crews vs. Burcham, the Indian had immediately upon the ratification of the treaty and under its terms, a present vested, alienable interest or right in lands. Under the act of July 17th, 1854, the Half-Breed had at best nothing but a right to receive scrip Not until that scrip had been located would there be any analogy between his right and that granted by the treaty with the Pottowamies. Prior to the location of the scrip the right existed only in the form of scrip and bore no analogy to the grant in *praesenti* of a certain number of acres of land thereafter to be selected as under the Pottowamie treaty; for in the latter case the duty of selection was an absolute and merely ministerial one on the part of the Government, which could be enforced against it. The title to the lands granted or reserved was both present and absolute. This was not the condition evidenced by the scrip in question.

Congress too has furnished an illustration how difficult and impossible it is to conceive of an assignment of the evidence of a right without the assignment of the right itself and vice-versa, for it authorizes by the act of January 23, 1832, the issuance of a patent directly to the person to whom the final certificate had been assigned. The practice authorized by this statute would obviously be very inconvenient to the Land Department in compelling it to take cognizance of various transfers of the right to a tract of land between the time of the entry thereof and the issuance of the patent, and the pracitce was sanctioned for but a short time. No such consideration of inconvenience would,

however, prevail in the case of the assignment of a mere certificate or evidence of a right to acquire a tract of public land, for as the possession of the certificate with proper assignments executed in such manner as might be prescribed by rule, would evidence ownership and the absolute right to acquire the lands, it would be both proper and convenient that the Land Department should recognize the ownership of the certificate in the person who presented the same with duly executed assignments thereof.

On the other hand, after allowing the location or entry in pursuance of the right evidenced by such certificate, its duty, except as to the mere ministerial one of issuing the patent conveying a legal title, was at an end. There was neither propriety nor useful purpose to be subserved in requiring the Land Department to keep track of subsequent transfers of the lands or the certificate given upon location or entry, for whatever rights were acquired in the lands subsequently to the entry or location would be a proper matter for the arbitrament of the courts, which could control the legal title evidenced by the patent as the justice and equities of the case might demand. But in the mere matter of taking cognizance of duly executed assignments of the scrip or certificate evidencing the right to appropriate public lands as distinguished from a certificate evidencing its location and ownership, there was no more inconvenience than for a register of deeds to accept and place of record, conveyances executed in accordance of law or for a banker to accept commercial instruments duly assigned or endorsed.

By the clearest possible words Congress evinced its intention that the Indian should remain the absolute owner of the scrip, no transfer or conveyance of the same being valid. This would necessarily include all rights flowing from its possession and use, for a transfer or conveyance is the means by which a title or ownership is divested. The conception of the absolute ownership of the scrip as some-

thing distinct and separate from the right evidenced thereby is an impossible one. That is to say, the conception of an absolute inalienable ownership of the scrip in the Indian and at the same time a beneficial interest or use in some one else necessarily giving him the control of the scrip and of its disposition. If the Indian could part with the beneficial interest in or equitable ownership of the scrip he would cease to be the owner of the scrip itself. He would hold it at most merely as trustee for the beneficial owner who could, if the transaction were valid, compel the Indian to make such use of the scrip as was contemplated by the contract. In advance of location of course the scrip was neither land nor an interest in land. If a third person should desire to acquire a particular piece of land and should agree with the Indian that the Indian should locate this scrip on such land, obviously if the contract were valid a court of equity would compel the Indian to so locate his scrip and to convey the land located therewith to the vendee.

If the Indian should violate the agreement and locate the scrip upon other land then the injured party would have the right, if the contract were valid, to follow the scrip, which by virtue of his agreement had become his property, into the new form of land into which it had been converted.

If a third party contracted with the Indian that he would locate his scrip upon any land which such third party should select and thereafter convey the land to him, if the contract were valid a court of equity upon the selection of such third person of the land desired, would decree the specific performance of the contract and compel the Indian to locate the scrip accordingly. In all of such cases the absolute ownership and control of the scrip would be not in the Indian but in the third person who had contracted for the exercise of the privilege or right evidenced thereby in

his own favor. All such contracts would amount to a transfer or conveyance of this scrip, at least in equity, and either the statute of uses or the doctrines of equity would execute the use or convert the Indian into a trustee for the real beneficiary. There would at least be an equitable assignment, transfer or conveyance of the scrip. The Indian's ownership would cease. When Congress said that no transfer or conveyance of any such certificates or scrip should be valid the language certainly included any transfer whether by way of agreement to use the scrip in a particular manner or the land to be acquired therewith, and whether such transfer or conveyance be legal or equitable in its character or a device in fraud of the act whereby a person appropriates to himself the beneficial ownership of the scrip.

This is a matter neither of strict nor of liberal interpretation. It is the plain import of the language used.

To take the plainest illustration of an attempted separation of the right evidenced by the scrip as something distinct from the scrip itself, which under the act must be and remain the property of the Indian, let us suppose that the Indian either after the passage of the act of 1854 and before the issue of the scrip or after the issue of the scrip should convey to a person by deed of warranty all of his right under the act or all lands that he should thereafter acquire by means of this scrip. This would still leave the Indian free to locate the scrip or not, as he saw fit, and if he ever did locate it, the time when and the lands upon which it should be located would be left entirely to his discretion, whim or caprice. He would not be bound in any relation of agency or trusteeship to locate it for the best interest or in accordance with the wishes of the person who held the deed. The very moment that any condition was imposed as to the time when or the place where the scrip should be located, such condition would operate upon the scrip itself, its ownership, dominion and control, and would

be obnoxious to the clause against the alienation of the scrip.

Of course a court could not compel the Indian to locate the scrip at any time upon any land, or at all, without recognizing the ownership of the scrip itself as such in some one, other than the Indian. It would certainly appear from such considerations that Congress never intended that there should be a right in the Indian prior to location capable of transfer or alienation or apart from the absolute ownership of or dominion over the scrip itself.

Again the consideration of such cases as Crews vs. Burcham, Doe vs. Wilson, and others, reviewed in Jones vs. Meehan, 175 U. S. 1, makes more clear the impossibility of a conception of a right as apart from the scrip which could be the subject of transfer. These cases all related to the effect of a present grant or reservation from the ceded territory in severalty to a chief or other member of the tribe by the very terms of the treaty itself.

In Crews vs. Burcham, referring to such reservation, the court says: that title to no particular land "could vest until the selection by the president and perhaps the issuing of a patent—but the obligation to make the selection and to issue the patent is absolute and imperative. * * * The agreement was one which, if entered into by an individual, a court of Chancery would have enforced by compelling the selection of the lands and a conveyance in favor of the reservee, or in case he had parted with his interest in favor of his grantee, and the obligation is not less imperative and binding because entered into by the Government."

In the case supposed, the Indian could not have been compelled to make any selection or any use of his scrip whatever, nor could the Government have been compelled to select any lands or to give title to any lands without the production and surrender of the scrip and the performance

by the Indian of the conditions imposed by the law, as prerequisite to the location of the scrip.

Again in the case of Crews vs. Burcham as in Doe vs. Wilson, the question arose between two grantees by deed of warranty of the lands or right reserved by the treaty in favor of a chief or member of the tribe; one deed made by the chief in his life-time in advance of the selection or identification of the land reserved to him, the other made by his heirs after the survey and patent. The court held that the title passed by virtue of the first deed.

In the case of Sioux Half-Breed scrip, it is obvious that no right passed to the Indian by virtue of any treaty nor except by virtue of the act of Congress, such right to be exercised in the manner, upon the conditions and by means of the scrip issued under or prescribed by the terms of said act. In advance of the issue of the scrip certainly the Indian had no right under the act of Congress, which he could convey, for the right recognized and provided for in that act, was neither a right in lands or to lands; merely a right after proper identification to receive scrip. This was the only right which the Indian had and of course the only right which he could convey. Certainly the right to receive scrip could not be assigned or transferred.

By virtue of the treaties referred to in the Crews vs. Burcham, and Doe vs. Wilson cases, an absolute alienable estate in fee simple to lands as such, passed at the very moment of the adoption of the treaty.

After the issuance of the scrip, as we have already seen, there was no right apart from or independent of the particular ownership and control of the scrip itself. It would be impossible that the question could have arisen which arose in the two cases last referred to as between an earlier and later grantee of the same right, for in the case supposed, if the Indian had given a warranty deed of his rights under

the scrip or the land that should be acquired therewith, to one person, and then had subsequently after the location of the scrip, given another deed for the land located upon to another person the latter person would necessarily have the title; for in advance of location there would be nothing for the first deed to operate upon.

It could not operate upon lands which were neither granted, reserved nor as to which there was any duty of selection by any person. It could not operate upon any right, because independent of the scrip itself, its possession and ownership, there was no right, and it is obvious that unless it did operate directly upon the scrip itself and effectuated a change of ownership thereof it must be wholly void.

No case can be found, we believe, where the assignment of the evidence of the right is prohibited but that the assignment of the right is also enjoined; the scrip bears no analogy to final receipts issued to pre-emptors or homesteaders. In the latter case the receipt is the evidence that a party has complied with all the requisites of law in order to entitle him to a particular parcel of land and is entitled to the patent of the Government, therefore it will be issued in due course; not so with scrip, which is merely the evidence of a right to acquire land. But even in the case of final receipts, when Congress, provided as it did, by the act of January 23, 1832, (See Camp vs. Smith, 2 Minn., 131) that these final receipts might be assigned, it also evidenced its intention that the receipt should carry all rights evidenced thereby for it was provided that patent should issue to the persons to whom the receipt was assigned, and this, notwithstanding the fact that in such case the receipt was merely the evidence that a person was entitled to a specific tract of land, patent for which would issue to him without the surrender of his receipt, upon the records of the Land Department.

So in all cases of scrip where the right is assignable, the scrip itself is also assignable.

In no instance where the Government has issued land warrants or scrip undoubtedly assignable, as distinguished from certificates or scrip, evidencing a purely personal right, has it ever shrunk from the duty of passing upon the regularity of the assignments, and of issuing the patents to the owner or holder of such scrip by whom it was validly located.

On the contrary, in some instances, such warrants or scrip are in terms declared assignable under rules and regulations to be prescribed by the Commissioner of the General Land office, and others are held to be assignable by reason of the terms of the law authorizing their issue, clearly indicating that they may be located by the person to whom issued, their heirs, legal representatives or assigns.

In the first class are military bounty land warrants, see acts of:

March 22, 1852, 10 Stat., 3.

June 3, 1858, 11 Stat., 209.

Sec. 2414, Rev. Stat.

And the scrip known as "Surveyor Generals" or "Supreme Court Scrip" issued under acts of:

June 22, 1860, 12 Stat., 85.

March 2, 1867, 14 Stat., 544.

June 10, 1872, 17 Stat., 378.

June 28, 1879, 20 Stat., 27.

With respect to these, full and specific regulations concerning assignments were formulated and are being constantly enforced.

1 Lester, 592 and 598.

Circular of Instructions, Feb. 13, 1879.

See also as to Porterfield Scrip, (Copp's 805.)

When it is considered that the issue of bounty land warrants number in the hundred of thousands and more, and of the Supreme Court scrip easily in the thousands, the argument that assignability of the few hundred of pieces of Sioux Half-Breed scrip is restrained solely that the Government may not be under the necessity of ascertaining that its poor, unlettered wards have not been deprived of their property by false, fraudulent and invalid assignments, loses its force.

The simple fact is, and it explains reasonably and easily the provision of the act of July 17, 1854, that all land warrants or scrip issued by the Government evidences a right, in the person to whom issued, to acquire land according to its terms, and when that right is one that may be lawfully transferred, the scrip or warrant may also be, and is transferred, and the location is made by, and patent issued to, the owner thereof. When the right cannot be transferred no lawful transfer of the scrip can be made, and an express prohibition against the transfer or assignment of scrip evidencing the right is necessarily a prohibition of the sale of the right itself. It seems absurd to say that you can sell the right itself, and not the evidence of the right, for one logically goes with the other.

The rule that restrictions upon alienation are strictly construed have no application in this case, for this rule is merely one of construction, the object of which is to ascertain the legislative intent.

If the legislator has not clearly expressed himself in the matter of restriction on alienation, then in obedience to a public policy which in aid of commerce encourages the free transfer of property, the legislator is presumed not to have intended more than he has clearly expressed. But this rule has never been applied otherwise than to ascertaining the legislator's intent in case of ambiguity and

never frustrates that intent when clearly expressed, or permits an evasion of it. But this policy, the freedom of commercial dealing, does not extend to the case of minors or other incompetents.

In the case at bar we have the policy of the legislature expressed in the clearest possible terms in a statute which relates to the property rights of incompetents, persons in a state of ward-ship, the alienation of whose property it has always been the policy of the Government to restrict in a greater or less degree, and while it is always recognized as wise public policy to fetter or hamper as little as possible the free sale and exchange of lands belonging to persons *sui juris*, it would be absurd to attempt to extend this principle of construction to the case of a few ignorant or semi-civilized Indians, wards of the Government, and to make it applicable to the few pieces of scrip evidencing their right to acquire public land.

It is the white speculator who would invoke such a rule for his own benefit; not in the interest of either the Indian or of trade and commerce generally.

VI.

TO ENTITLE EATON AND HIS ASSOCIATES TO RELIEF AGAINST THE PATENT OF THE GOVERNMENT THEY MUST SHOW A BETTER RIGHT TO THE LAND THAN THE PATENTEE, SUCH AS IN LAW SHOULD HAVE BEEN RESPECTED BY THE OFFICERS OF THE LAND DEPARTMENT, AND BEING RESPECTED, WOULD HAVE GIVEN THEM THE PATENT. IT MUST AFFIRMATIVELY APPEAR THAT THEY WERE ENTITLED TO IT AND THAT IN CONSEQUENCE OF THE ERRONEOUS RULING OF THOSE OFFICERS ON THE FACTS EXISTING IT WAS DENIED TO THEM.

Sparks vs. Pierce, 115 U. S., 408-413.

Bohall vs. Dilla, 114 U. S. 47.

Lee vs. Johnson, 116 U. S. 48.

The Half-Breed did not demand the patent; on the contrary she joined as a complainant in the contest against the location of the scrip, and it may be stated as a fact appearing from the records of the Land Department and of the District Court of Ramsey County, Minnesota, that the heirs of Orillie Stram, after the cancellation of the Eaton location brought suit to recover the scrip from the local Land officers at Duluth, and by the judgment of the District Court of Ramsey County, Minnesota, entered February 7th, 1896, obtained possession of said scrip and thereafter caused the same to be located. No. 19 E., on the SE. 1-4 of section 20, township 45, north of range 15 west in Wisconsin, and No. 19 D,. on the S. 1-2 of the SW. 1-4 and the NE. 1-4 of the SW. 1-4 and the NW. 1-4 of the SE. 1-4 of section 27, township 44, range 15 W. in Wisconsin. Of course if Eaton's location was valid when made, no subsequent action of the Government could defeat or affect the same and therefore no attempt was made to introduce in evidence the record of what subsequently became of this scrip. We merely mention this fact in passing.

The character of the whole transaction being made to appear, however, if she had demanded the patent it would have made no difference for it would have been confessedly for the sole benefit of Eaton and to consummate the sale of her scrip that she demanded it, and also as to lands to which, under the terms of the act of Congress she was not entitled.

But it is Eaton and his associates and grantees who demand the patent nominally for the Indian who parted with her interest in the scrip when it was sold. Eaton admits that the scrip was conveyed to him and that the location was for his benefit and the land actually conveyed to

him and his associates practically by himself. The use of the name of the Indian is a confessed sham.

Now if the whole transaction as shown by the evidence before the Land Department upon the hearing, had been presented to the local officers at the time Eaton applied to locate, this would be substantially the representation Eaton would have been compelled to make to them: **"I and my associates and employes desire to acquire a valuable tract of unsurveyed land belonging to the United States. My employes are now in possession of the same under a homestead claim, they to receive a third of the land from me when the title is perfected. They have made some so-called improvements under this homestead claim and have prevented other people settling on this land by armed force under my instructions, in order that I may directly or through my employes secure title to the tract. I have bought from a broker a piece of Sioux Half-Breed Scrip making use of two blank powers of attorney to accomplish the transfer and I desire to use the same to acquire this land for myself. The blank in the power to locate I have filled in in my own name and as soon as you allow the location I will make use of the power to convey by inserting the name of my business partner and have him convey to me and my associates. The Half-Breed had nothing to do with the improvements on this unsurveyed land and knew nothing about them. They were made by my employes under a homestead claim and now that I have the scrip I shall make use of these improvements to locate the scrip, as the act of Congress requires that the Half-Breed shall make improvements upon unsurveyed lands. The improvements were made by me and for my personal use and benefit to enable me to get the land."**

This is the affirmative showing made by Eaton's own case as disclosed by the evidence upon which he claims that the officers of the Land Department erroneously ruled and upon which he claims that it was the duty of the Land Department to have issued the patent of the Government to him.

But while this showing appeared before the Land Department when the testimony was taken and now appears before this court, whose equitable interposition Eaton and his associates and their grantees invoke, it did not appear when Eaton was allowed to make his location and when he produced but one power of attorney, that to locate, accompanied by his affidavit that the improvements were made "under the personal direction of the said Orillie Stram and for her personal use and benefit."

The officers of the Land Department upon this showing should have cancelled Eaton's location in the absence of a contest.

Lee vs. Johnson, 116 U. S. 48.

Knight vs. Association, 142 U. S.

A court upon such a showing, will deny the defendants any equitable relief.

Flournoy Live Stock Assoc. vs. Beck, 65 Fed. Rep. (U. S. C. C. A.) 30.

VII.

THE ERROR OF THE SUPREME COURT OF MINNESOTA IN NOT REVERSING THE JUDGMENT OF THE TRIAL COURT AND DIRECTING JUDGMENT FOR THE PLAINTIFF IN ERROR IS EMPHASIZED BY THE MATTERS APPEARING IN ITS OPINION AND THE REASONING EMPLOYED THEREIN.

Proceeding now to the discussion of the decision of the Supreme Court of Minnesota, we find it difficult to so sep-

arate and analyze the decision as to make it clearly appear what particular portion thereof the court intended to apply to surveyed lands and what particular portion thereof to apply to unsurveyed lands or what portion thereof relates solely to the clause against the assignability of the scrip, and what portion thereof relates to the locations thereof upon unsurveyed lands upon which "they, (the Half-Breeds) have respectively made improvements."

The grounds of the decision are numerous. In short it may be said that every position advanced by counsel for defendants in their argument, and by the court below in its memorandum annexed to its decision, is sustained, and that every position, without exception, taken by the Land Department of the United States, the Supreme Court of Minnesota, in previous decisions, and the Supreme Court of the United States, is over-turned. The decision is therefore the most sweeping and far-reaching that could possibly be rendered, and it convicts not only the Land Department but these courts of error, not merely in one but in all particulars.

The decision does not state in one paragraph or in one place the precise grounds upon which it proceeds. It is diffuse or scattering; it seems to us to confuse or blend the propositions involved in this case with many others in no wise relevant or material.

We shall proceed to collect and present the grounds upon which the decision proceeds and to answer the reasoning of the court in support of its conclusions.

And first of all and lying at the root of the whole matter, the court decides that the scrip in question did not evidence a purely personal right in the Indian. For, if the scrip did evidence such right, it follows as a necessary consequence that that privilege could not be availed of by any means, direct or indirect, whereby any person other than

the Indian could avail himself of it; and that it will be not merely the right but the duty of the Land Department to prevent such a use of the scrip as would amount thus to a misappropriation of the public lands; that is, allowing it to go "to persons not entitled thereto," at the same time that the policy of the law with reference to the protection of the Indian, for whose benefit the scrip was issued, would be frustrated. This is, therefore, a most vital proposition and reaches the heart of the whole matter in so far as the clause against the transfer, or conveyance or assignment of the scrip is concerned. As the court is already in possession of the reasons which induced the passage of the act in question, and various other matters connected with its application by the Land Department and the courts, state and federal, it becomes pertinent at this point to inquire what induced the Supreme Court of Minnesota, in the year 1900, to take a view diametrically opposite to that entertained by the Department and the courts for forty-six years.

The court says, that there are two facts to be borne in mind in determining the correctness of the Secretary's views, as found in his decision of February 18, 1889. The first is, that the law contained a provision that the certificates or scrip should not embrace more than 640 nor less than 40 acres each, and that they were to be apportioned among all of the mixed bloods indiscriminately without reference to age, sex or other conditions, the result being that "old and young adults and minors, male and female, those that had but little Indian blood in their veins and those in whom such blood greatly prevailed, were the recipients."

The second is, that under the law there was issued to each one of 640 persons five pieces of scrip, two for 40 acres each, one for 80 acres and two for 160 acres each, a total of 480 acres, and to each one of 38 persons one piece for 40 acres and two for 160 acres, in all 360 acres to each.

The inference which the court draws from these facts is obviously that the beneficial interest in or ownership of the scrip could be parted with by the Indian. The Court says:—

> "Nor did the law require that the lands on which the scrip was located must be selected by the mixed bloods for personal use, or even that a claim of this kind should be made. In fact, as we have seen, the inference to be drawn from this language and from what was done at and about the time is to the contrary, and the Secretary erred in holding upon the facts as found, that the scripee had no interest whatever in the location made by her attorney in fact. Such a holding is in effect deciding *that every piece of scrip* issued to the mixed bloods, *which cannot be used by the recipients for his or her own personal benefit* and for the acquirement of lands for his or her own personal use, could not be used at all and was of no value."

The explanation of the facts referred to is simple, and was well understood by the Congress which passed the act upon the face of which these facts appear.

With reference to the first fact that the act of Congress provides that the certificates or scrip shall call for not more than 640 acres nor less than 40 acres each, the language is entirely clear but to understand the reason of the provision we have to go to the treaty which led to the passage of the act and the history of the matters connected with the same, all of which will be found collected in Commissioner Manypenny's report accompanying the bill when it was prepsented to Congress, which is submitted herewith as an appendix.

The reason for this provision was in short as follows:— Under the provision of the 10th Article of the Treaty of July 15th, 1830, 7 Statutes, 331, it was provided that the President of the United States might thereafter assign to

any of the said Half-Breeds, to be held by him or them in fee simple any portion of said tract not exceeding a section of 640 acres to each individual. Under the terms of this treaty as construed no Half-Breed could in any possible event be entitled to more than 640 acres of the Reservation, and whether he would be entitled to this or not was solely discretionary with the President. (See Report accompanying Bill.)

It was known that the Lake Pepin Reservation contained something more than 300,000 acres, as a subsequent survey showed, about 320,000 acres. (See Report of Secretary of Interior, Messages and Documents, 1856-7, page 214.) The number of Half-Breeds who would be entitled to participate in the division was not known, but it was supposed to be only about 200. (See Report of Commissioner Manypenny accompanying Bill.) At the time of the passage of the act it was therefore supposed that there would be a large surplus of land in the reservation after satisfying the maximum claim of each Half-Breed for 640 acres. As there had been doubts as to the construction of this treaty Congress provided in the act that the Half-Breeds should relinquish their claim to the Reservation, the especial object of this provision being with reference to the supposed surplus that might exist. As a condition of receiving scrip, therefore the Half-Breeds were required to relinquish their claims to the Reservation. Thus is explained the provision in the act providing that the certificates should contain not more than 640 acres each and the minimum of 40 acres was probably provided out of excess of caution, so that in any event should the number of Half-Breeds prove much greater than supposed, they should, in consideration of the relinquishment of their Indian title, which was all that they had to the reservation, receive not less than 40 acres of land, even should there not be land enough in the reservation to give that amount. For a full

history of this matter, see report of Commissioner Manypenny accompanying bill.

The particular bearing that this provision of the treaty had in the mind of the court upon the clause against the assignability of this scrip is apparent also from the following:

> "There is also another proviso in the act of July 17, 1854, that no transfer or conveyance of any of said certificates or scrip shall be valid. **It is clear** that this **is a positive and emphatic prohibition on the assignability of the certificates or scrip,** but it is not a prohibition of the conveyance of the land upon which the scrip had been located. As was said in Gilbert vs. Thompson, 14 Minn., 544, (Gil. 414.): 'No restraint is imposed upon the right of property in the lands **after it is acquired** by the location of the scrip. In the scrip itself the Half-Breed had nothing which he could transfer to another, but **his** title to the land, **when perfected under it,** was as absolute as though acquired in any other way. It follows that any attempt to transfer the scrip, directly or indirectly, would be of no effect as a transfer. The **title to the scrip** would remain in him, and the **title to the land** acquired by it **would vest in him** just as though no such attempt had been made. Such attempt to transfer would not involve any moral turpitude, nor the breach of any legal duty, as is the case with an attempt to transfer a pre-emptive right. It would be simply ineffectual, **because the scrip is not transferable.**' * * * * * The entire purpose of the act itself seems to have been to promote and secure an exchange of the interests of the mixed bloods in the reservation which was becoming valuable for actual settlers for certificates or scrip, which would be available for the acquirement of title in fee to specific parcels of land there or elsewhere on the public domain. It was proposed to compensate the mixed bloods who surrendered their rights or claims under the treaty

in a manner which would be of some value, and it has been held that the fact that the Government saw fit to make the scrip as such, non-assignable, does not operate to prevent the beneficiary from making an agreement before location or giving power to convey the lands when the scrip should have been located and the lands entered."

And the court further says:

> "Nor need we stop to consider why Congress saw fit to declare that the scrip should not be assignable and fail to deprive the scripee of the power of alienation immediately after the location, **and in pursuance of a promise previously made.** It is enough to know that the prohibition related solely to assignment of the scrip itself."

Thus we find that the court takes the bare, bald position upon this proposition, that the language of the clause "provided further that no transfer or conveyance of any of said certificates or scrip shall be valid," did not mean that the right to acquire public lands by means of this scrip should be a personal right in the one to whom the scrip issued. And this is so clear to the court that it says no inquiry is necessary as to the object of the provision, and further says that it "need not cite decisions" in support of this proposition, (that the clause against assignment 'does not operate to prevent the beneficiary from making an agreement before location'),"for they are abundant—federal and state."

We regret that the court did not take time to cite a single decision to this effect, for we feel compelled to say that not only is there no authority to this effect but on the contrary every authority, state and federal, is directly opposed to the statement of the court.

We are utterly amazed at this statement of the court for a variety of reasons: (1.) That for the first time in the forty-six years since the passage of the act has such a sug-

gestion been thrown out by either the Land Department or any court, state or federal, before whom the act in question has come for consideration, and the direct contrary has always been held. (2.) Because in quoting from Gilbert vs. Thompson, the court quotes only that portion of the opinion which, while being against the position assumed by it, throws the least light upon the proposition which it was considering, viz; the clause as to the assignability of the scrip and the character of the right evidenced by such scrip. We shall therefore quote the portion of the opinion which the court omits. The same is as distinct and unequivocal a declaration of the policy of the law of July 17, 1854, as is to be anywhere found. The quotation is as follows: (The black letter being our own.)

Gilfillan, C. J. **"The Act of Congress of 1854, under which Sioux Half-Breed Scrip was issued, provides 'that no transfer or conveyance of any of said certificates or scrip shall be valid.'** It was the intention of Congress that the **right to acquire public lands** by means of this scrip **should be a personal right** in the **one to whom the scrip issued,** and not property in the sense of being assignable. But no restraint is imposed upon the right of property in the lands **after it is acquired** by location of the scrip. * * * * * A power of attorney, so far as intended to operate as a transfer, would be of no avail; the **right** of the Half-Breed in the **scrip** and **land** would remain the same. It could not be made irrevocable nor **create any interest** in the attorney."

When therefore the court tells us that the clause against assignment does not operate to prevent the beneficiary from making an agreement before location, that the decisions, state and federal, to this effect are abundant and then gives only a portion of the decision referred to, we are, as we say, amazed; and especially when we remember that

this decision was rendered in 1869 and that the very position taken by the court in the present case was argued at length before the Supreme Court in the Gilbert vs. Thompson case and then rejected as unsound, and that this fact was called to the attention of the court in this case upon the oral argument.

To prevent any possible misunderstanding we have procured a certified copy of the briefs of the counsel in the Gilbert vs. Thompson case and we submit the same to the court as appendices to this brief.

And yet in this summary manner, without the citation of an authority in support of its position and absolutely ignoring every authority opposed thereto; with absolutely no reason given for its conclusion, (and it says it is unnecessary to inquire for any beyond the language of the act itself) after the forty-six years of uniform, harmonious understanding and attempted enforcement of the law by the Land Department, the Supreme Court of Minnesota and the Supreme Court of the United States, upon the faith whereof property rights have vested, the Supreme Court of Minnesota adopts an entirely new, different, and, as it seems to us, unreasonable interpretation of it, utterly at contrariety with all that had gone before and utterly subversive of the known policy of Congress.

It is not necessary to discuss the further proposition at length "that the clause in question does not operate to prevent the beneficiary from giving power to convey the land when the scrip shall have been located and the lands entered," for we assume that the court must refer to a bona fide power and not one, which operating in connection with a power to convey, was intended to effect a transfer of the scrip, such as, under the decision of the Secretary which the trial court finds was sustained by the evidence before him, was given to Eaton in this case.

The second reason or fact adverted to by the court which seems also to have had very great weight with it, is the fact that five pieces of scrip were issued to each individual, calling in the aggregate for 480 acres.

The act of Congress did not direct this. It was a matter of detail which the Land Department attended to, and it evidently contemplated, and most properly, that the interests of the Indians and the convenience of the Department would be subserved by not requiring the Indian to locate the whole 480 acres in one body.

The situation and necessities of the case forced the Land Department to adopt this course, for some of the Half-Breeds had occupied lands on the reservation and had improvements and homes upon them and were entitled to locate the scrip within the reservation upon these lands to protect them. If an Indian occupied a 40 or 80 acre tract and some other Half-Breed or "other person who had gone into said reservation under authority of law" occupied an adjoining tract, it is obvious that if the scrip were in single 480 acre pieces it could not be located upon a small tract without sacrificing the excess. So too, as there was a large number of Half-Breeds living upon the Reservation, some 200 or more, at least, it may be assumed that many if not all of them had individual houses or improvements upon the reservation, as well as perhaps a considerable number of other people, who had gone into the reservation "by authority of law." It will be seen that the necessity for dividing the scrip into blocks of convenient size, must have at once presented itself to the minds of the Department officers for the reservation was obviously well broken up by numerous homes and improvements upon it. See 1 Lester, 635.

The Land Department did in advance, what if it had not then done it would, in justice to the Indian, have been

compelled to do later at great inconvenience to itself as well as to the Indian.

The court inferentially concludes from this fact (that a number of pieces of scrip were issued to the same individual) that the scrip did not evidence a personal right in the beneficiary or prevent the alienation thereof indirectly of such as he did not desire for his personal use, because the Indian could not be supposed to personally use or occupy a number of distinct tracts of land. But in answer to this it may be said that neither the law of Congress nor the regulations of the Land Department contemplated or required that the Indian should do so. The law did not assume to protect the Indian in the enjoyment of the lands after he got them, to the extent of prohibiting the free alienation thereof. It was the scrip which could not be transferred or assigned. The act in question did not effect the exchange of lands; it gave the Indian the means to consummate an exchange, and simply provided that he should not be deprived of this means. Congress exercised its supervision and duty as guardian up to the time when the exchange was actually effected. As the Indian relinquished his right to lands in the reservation, Congress proposed to see that he got something more than a slip of paper in exchange; to see that he actually got lands, and when the court says: "It was proposed to compensate the mixed bloods who surrendered their rights and claims under the treaty, in a manner which would be of some value," it has unconsciously stated the case with entire correctness, and Congress took the only possible means of making this scrip of any substantial value to the Indian, viz; by seeing or attempting to see to it, that they got what the scrip called for.

But further reference is made to the fact that this scrip was issued to old and young alike, to the decrepit and to the infant and minor.

Now, with reference to surveyed lands, at least, the rules and regulations of the Land Department expressly provide that the location may be made by agent or guardian. When it came to the matter of sale the land would probably be of very much more value to either the infant or the decrepit than the piece of scrip constituting the means by which they were to acquire land and furnishing the evidence that they might entitle themselves to it.

The court proceeds further as follows:

"With these facts before us, can it be urged that Congress thought or intended that these minors would be required by a construction of the law, to personally supervise the selection of from three to five tracts of land on which to locate their pieces of scrip, or that they would have to be directly connected with each of these locations, or, in case unsurveyed lands were desired, they would have to claim the necessary improvements as their own? In other words, do not these facts indicate, to a moral certainty, that it never occurred to the members of Congress that the construction placed on this law by the Secretary would be given to it at any time, much less, after thirty years of a wholly different construction, and a construction also which received judicial recognition and approval? See Gilbert vs. Thompson, Supra; Hope vs. Stone, 10 Minn., 141, (Gil. 114); Marks vs. Dickson, 20 How., 501, 15 L. E. D., 1002. We are confident that they do so indicate and that the requirements found in the circular of May 28, 1878, were not in accordance with the law and were therefore unauthorized. The act itself never required that the improvements should be of a certain kind or value, or that the scripee should be directly connected with the land. It quite conclusively appears to the contrary, when we consider the facts before referred to, unless we take the position that the legislative branch of the general Government intended to confer upon the

mixed bloods, in exchange for their interests in the reservation, scrip which would be of no value unless the recipients made personal selections, were directly connected with *the location and improvements*, and made claim to *both for their own use and benefit.*"

The first proposition then, involved in the above quotation, is that the Indian was not required by the act to personally supervise the selection of the lands, that the improvements were not required to be of a certain kind or value and that the scrippee was not required to be directly connected with the land.

But these are all merely evidential facts and do not reach the root of the matter, viz: The meaning of the language of the act and the policy of Congress.

Another proposition is that the act of Congress did not require in case unsurveyed lands were desired, that the Indians "should have to claim the necessary improvements as their own."

This we accept as expressing the opinion of the court, that the right to locate, with the scrip in question, unsurveyed land, is not subject to the condition that such lands must contain improvements made by the Half-Breed, but that such improvements can be made by anyone and the lands thereupon appropriated by the scrip.

The necessary inference from the language of the court is, that the Half-Breed may sell his right to take lands, evidenced by the scrip issued to him, and that the persons to whom that right is sold may thereupon take unsurveyed lands if he so desires, by making for his own benefit some improvements thereon. This follows from the opinion of the court, that the Half-Breeds are not required to "claim the necessary improvements as their own," or "the location and improvements * * * for their own use and benefit." The argument in this connection is based upon the

proposition that as the scrip was issued to the old and feeble, to the young and weak as well as to the strong it would be of no value to them owing to their inability to make or supervise the making of the required improvements. This necessarily involves the determination that Congress intended to subject to appropriation by means of this scrip the unsurveyed lands of the United States as freely as were subjected the surveyed lands, and is based upon what appears to us to be an entire misconception of the purpose of the act. That purpose was, to permit the location of said scrip upon unsurveyed land only when and in such cases as the Half-Breed to whom it was issued was in possession or occupation of improvements thereon. It was to afford him the means to acquire the lands upon which he had settled and thereby protect him in his ownership and possession. It was not at the date of the passage of the act in question and it is not now, the policy of Congress to authorize the sale or disposal of unsurveyed lands. The instances in which they can be appropriated are few and depend upon special reasons, such as we have just given, with respect to this particular scrip. In 1854 Congress had not generally recognized even the inchoate rights acquired by pre-emption and homestead settlers, which right is defined by this court to be the privilege of acquiring the lands settled upon, in preference to others, should the lands be brought into market for disposal, but as vesting no right in a settler as against the Government itself.

Now as it seems to us, the fact to which the court has adverted, viz., that this scrip in the hands of the aged and youthful would be of no value as to unsurveyed lands unless located by some other person who made the improvements thereon for his own benefit, is directly opposed to the inference which it draws from it. For the Half-Breeds were neither invited nor in any wise induced to settle or make improvements or locate their scrip upon unsurveyed

lands, and Congress certainly never contemplated that the decrepit and the minors at least would do so. There were millions of acres of surveyed lands upon which the scrip could be located without improvements and the locations could be made by guardian or by duly authorized agent. It did not invite or induce the Indian to go upon its unsurveyed lands. It had no object in having him there, but if he did go beyond the limits of the reservation, beyond the confines of civilization, beyond the limits of surveyed territory and did make improvements, Congress as a matter of personal privilege to him, and to protect him in those improvements, gave him the privilege of locating scrip thereon.

The court also, in its reference to the circular of 1878, seems to have forgotten the requirements of the circulars of 1864 and 1872 of which the circular of 1878 is practically a codification or restatement, especially as to unsurveyed lands.

And now we are led to inquire what the court means by its reference in the above quotation to a construction "also which received judicial recognition and approval. See Gilbert vs. Thompson, supra, Hope vs. Stone, 10 Minn. 141, (Gil. 114); Marks vs. Dickson, 20 How. 501, 15 L. E. D., 1002."

It would certainly be remarkable if the very courts which announced and declared the policy of the act in question should sanction and approve of any construction subversive of that policy, and the court is clearly mistaken in its statement; for the act in question has never needed the aid of construction. It has always been placed by the Land Department, as by the courts, in the class where, the intent being plain, nothing was left for construction.

The court does not tell us what the construction is to which it refers. Surely it does not quote Gilbert vs. Thompson as affording "judicial recognition and approval" of the proposition that the location of this scrip, whether upon

surveyed or unsurveyed lands must not be for the benefit of the Indian.

Proceeding to the next authority, Hope vs. Stone, 10 Minn., 141, we find that was a case where one J. C., a Sioux Half-Breed and a beneficiary under the act of Congress in question, living on the Lake Pepin reservation with her husband, in possession of a tract within the Reservation, quit-claimed it to a third party, one S., who quit-claimed to one A. with covenants for further assurance. The Half-Breed quit-claimed to S. in 1853 and prior to the act in question, of July 17th, 1854. In 1857 J. C., the Half-Breed, located her scrip upon this particular tract of land and after the location she and her husband conveyed by warranty deed to S. The question in the case arose between S. and A.; that question being whether by virtue of the warranty deed from the Half-Breed after location to S. his title derived thereby inured, by reason of the covenants, for further assurance, to A. and the court said that it did. In this case as to the location, no question was raised in the Land Department or in the Courts, and the only question decided or referred to that has the slightest bearing on the act, is, that the court decided that the two whites, A. and S., might enter into an agreement, the one to convey to the other, lands when he should acquire title to them, even though the lands at the time might be a part of the public lands of the United States. As before stated the first conveyance by the Half-Breed was in 1853 when she had nothing but the Indian title which never could be conveyed to anyone but the Government. And even if she had made an agreement to convey this land after the passage of the act of July 17th, 1854, as is said by the court in Gilbert vs. Thompson, it "would be simply ineffectual because this scrip is not transferable. The right of the Half-Breed in the scrip and lands would remain the same." We are at a loss to know what the court means by the citation of this authority in this

connection, and what is the construction, and what is the judicial recognition, to which it refers.

Marks vs. Dickson, 20 Howard, 501, is also cited. This case was between two white men and involved the construction of the pre-emption acts of 1830, 1832 and 1834. It seems that two settlers having made a settlement upon the same government sub-division were allowed to make up the deficiency when the matter was adjusted, by what was known as a 'float' or a right to locate lands elsewhere to the extent of the deficiency. One of the parties so entitled to this float sold the same to a third party. The float was subsequently located by a duly constituted attorney in fact, to locate the same and sell the lands acquired thereby, by the original holder of the float, and in pursuance of such authority this attorney conveyed the land to the same person who had previously purchased or attempted to purchase the float.

Subsequently and after the issue of the patent the original holder of the float attempted to convey the same land to another person, and it was between two persons, one claiming under the power of attorney and the other claiming under deed subsequent to patent that the question arose. It was claimed that the power of attorney under which the location was made and the power to sell after location was a mere device to evade the law. After reviewing the history of the legislation thoroughly the court said that as the entry was made under the law of 1834 there was no prohibition against assignment.

With reference to the act of 1838, which did in its policy prohibit any assignment direct or indirect, the court says, "This act (the act of 1838) was preliminary to the allowing of his entry and discloses the policy of Congress, but it has no application in this case as this claim was founded on the act of 1834." The court

further says: "But after the land was entered by Butler he had power to affirm his contract of sale at his option by conveying the land and which sale bound Butler and concludes Marks."

So that in the first place this case has no bearing whatever upon the policy of the act of Congress of July 17th, 1854, or the construction of the same with reference either to the clause against assignability or the right to locate scrip upon unsurveyed lands; second, in the decision there is certainly nothing to indicate that if the law of 1854, under which the entry was made, had contained a prohibition against assignment that the device of two powers of attorney would not be an evasion. In the third place there was no question whatever as to the bona fides of the attorneyship; and in the fourth place, the government had issued its patent for the land and it was beyond the jurisdiction of the Land Department.

We are at loss to know what particular construction or even practice of any kind received judicial "recognition" not to mention judicial "approval," other than the principle that one may lawfully do by attorney what he may lawfully do for himself.

No question of practice was before the court in any of the cases referred to, much less such a practice as was indulged in by Mr. Eaton in this case. And it will be well to notice in this connection that neither in the case of Hope vs. Stone, Gilbert vs. Thompson, nor Marks vs. Dickson, could there possibly have been before the court any question of practice calling for either its "recognition" or "approval," and the reason is that patent had issued, that the suit in each case was between individuals and the Government was not a party. We quote from Lee vs. Johnson, 116 U. S. 48:—

"The patent having been issued by the officers of the Land Department, to whose supervision and control was entrusted the various proceedings required for the alienation of public lands, all reasonable presumptions are indulged in the support of their action. It cannot be attacked collaterally, but only by a direct proceeding instituted by the government or by parties acting under its name and by its authority."

And in U. S. vs. Stone, 2 Wallace, the court says:

"The general public is left to the protection of the Government and its officers, * * * the fraud, if any exists, has been practiced on the government, and as the party injured, it is the appropriate party to assert the remedy or seek relief."

How therefore can it be that with the patent outstanding, which is conclusive proof against collateral attack that all the requirements of law have been complied with and the proper practice, whatever that may be, observed that there could be any question of practice before the court for recognition or approval? The patent on its face and by virtue of its own inherent force, answered such question if any arose as to whether the Government had been defrauded of its land by means of such practice or otherwise.

If the practice in the Land Department was subversive of the rights of the individual then such individual could with propriety question such practice in the courts in an action, not to set aside the patent, but to have the title derived thereunder, held in trust for him; but where the individual must take the position that not he, but the Government has been defrauded, and seek relief upon that ground, it is obvious that it cannot be afforded. We quote from Lee vs. Johnson, supra: "It is for the party whose rights are alleged to have been disregarded that relief is sought, not for the government which can file its own bill

when it desires the cancellation of a patent inadvertently or wrongfully issued."

Inquiring further as to what the court means by its reference to "thirty years of a wholly different construction" and referring to the regulations of the Land Department, we find that the earliest circular, that of 1857, not only particularly called attention to the non-assignable character of this scrip "transfers of the same being held void" but authorized no location of the scrip, unless made by the Indian in person or "by his or her guardian or duly authorized agent."

The court certainly upon this circular could not avoid the conclusion that a location by a guardian or agent, by necessary legal implication, must be for the beneficial interest of the ward or principal. And so with the circulars of 1864, 1872 and 1878 which required proof that the location was for the sole benefit of the reservee.

We are therefore left entirely in the dark as to what construction the court refers to as different from the construction given by the Secretary in 1889, and we are in the dark as to where the evidence of this thirty years construction is found.

We must therefore dismiss this branch of the discussion, remarking, however, that the real point, which would be the legitimate subject of inquiry, was, 'what was the policy of the act of Congress as embodied and expressed in the act in question? The only propriety in referring to the rules and regulations of the Land Department would be as an aid in the matter of construction in a case of ambiguity. For if the policy of an act of Congress is clear, and expressed in language not susceptible of more than a single construction, the Land Department could not defeat that policy by refusing or failing to enforce it. Webster vs. Luther, 163 U. S. 331, at page 341.

But the court elsewhere says, that there was a practice "definitely understood." By whom was it understood? Not by the Land Department which adopted the rules and regulations and promulgated the decisions relating to Sioux Half-Breed scrip. No, but to state the case in all of its baldness it was by the speculator, who desired to evade the provision of the law that the practice was "definitely understood." And that practice was to obtain with the scrip two powers of attorney, as in the present case, executed in blank, and the manner of making use of these two powers is described by Secretary Vilas in Allen vs. Merrill, (supra).

And let it be particularly noted, that after 1864, the speculator must file in the Land Office not only the power of attorney and the scrip but the affidavit as required by the regulations.

This definitely understood practice, so-called, was thus a fraudulent practice, not only not sanctioned by the Land Department but in violation of its instructions. The very fact that such evasion was and had to be resorted to was proof positive of the fact that there was no misunderstanding on the part of the Land Department or the speculator or anyone else as to the meaning and policy of the act. We then are left to the bare suggestion that this "definitely understood" practice was so successful an evasion of the law that it was generally, even commonly resorted to and this involves the further suggestion that the Department officials might have been lax in enforcing the law and their own rules and regulations adopted in furtherance of the same. Otherwise, inferentially, the practice could not have been so "definitely understood."

As to the question of fact involved in this inference the remarks of Secretary Vilas in Allen vs. Merrill, may be

referred to and as to the question of law involved therein, we quote from U. S. vs. Minor, 114 U. S. 240:

> "For the truth of these statements, they (officers of the Land Department) are compelled to rely on the oaths of the parties asserting claims, and such *ex parte* affidavits as they may produce.
>
> "In nine cases out of ten, perhaps in a much larger percentage, the proceedings are wholly *ex-parte*. In the absence of any contesting claimant for a right to purchase or secure the land, the party applying has it all his own way. He makes his own statement, sworn to before those officers, and he produces affidavits. If these affidavits meet the requirements of the law, the claimant succeeds, and what is required is so well known that it is reduced to a formula. It is not possible for the officers of the Government, except in a few rare instances, to know anything of the truth or falsehood of these statements. In the cases where there is no contesting claimant there is no adversary proceeding whatever. The United States is passive; it opposes no resistance to the establishment of a claim and makes no issue on the statement of the claimant.
>
> "When, therefore, he succeeds by misrepresentation, by fraudulent practices, aided by perjury, there would seem to be more reason why the United States, as the owner of the land of which it has been defrauded by these means, should have remedy against that fraud—all the remedy which the courts can give—than in the case of a private owner of a few acres of land on whom a like fraud has been practiced."

But if it be assumed for the purpose of argument, that the land officers were not imposed upon and that they knowingly allowed the law and their rules and regulations to be violated, this would make no difference. We quote from Webster vs. Luther, 163 U. S., 331:

"But this court has often said that it will not permit the practice by an executive department to defeat the obvious purpose of a statute."

See also Hewitt vs. Schulz, 21 S. C. Rep. 309.

Proceeding with the opinion, we repeat a part of the quotation above referred to:

"The act itself never required that the improvements should be of a certain kind or value, or that the scrippee should be directly connected with the land."

But as is said by the Supreme Court of Arkansas, in Simpson vs. Robinson, 37 Ark., 137,

"An improvement under our land system does not mean a *general* enhancement of the value of the tract from the occupant's operations. It has a more limited meaning, which has in view the population of our forests and the increase of agricultural products. All works which are directed to the creation of homes for families, or which are substantial steps toward bringing lands into cultivation, have in their result the special character of 'improvements,' and under the land laws of the United States and of the several states, are encouraged. Sometimes their minimum extent is defined as required to convey rights; in other cases not. But the test that runs through all the cases is always this. Are they real and made bona fide in accordance with the policy of the law, or are they only colorable and made for the purpose of fraud and speculation?"

When, therefore, the court says that Congress did not require "that the scripee should be directly connected with the lands" or should claim the same for her personal use and benefit, we ask that with the policy of Congress as it is known to be in this act, why was it not competent for the Land Office to require some reasonable evidence that the Indian did have connection with the improvements and that they were for his or her personal use and benefit? How

could a Half-Breed claim the privileges of this act without being both ready and able to furnish such proof? How could an Indian in good faith locate this scrip upon unsurveyed lands without having improvements made thereon either by himself or under his direction. If the policy of the act is as we have stated, why are the regulations of the Land Office, simply requiring proof that that policy had been observed, unwarranted, and why should the Land Department not be allowed to require evidence that these improvements, however slight their character, were "real and made bona fide in accordance with the policy of the law" instead of being "merely colorable and made for the purpose of fraud and speculation?"

The court further says:

> "No 'improvements' were required where surveyed lands were located and it is very evident that this requirement was for a minor purpose."

But as is said by Secretary Vilas in his decision, in Allen vs. Merrill:

> "This case relates to unsurveyed lands and a further limitation is imposed both to mark and to restrict the personal right of a Half-Breed to take such land? He is required to have made improvements upon it."

Proceeding the court says:

> "We have *discovered* that it was required, not that the improvements upon unsurveyed lands must be of a reliable or permanent character or that they should be made by the scripee or under his personal direction, but that the application should be accompanied by a diagram and description, that the exact locality might be designated and thus in connection with the improvements upon the ground, conflicts might be avoided between claimants and the locations more easily and certainly adjusted when surveys were actually made.
> * * * * * * * * *

The making of improvements by or under the scripee's immediate direction was not made of prime importance by the commissioner when preparing these instructions. The practice and custom of making scrip entries was definitely understood and well settled in the 17 years which followed prior to the issuance of another circular in 1864 emanating from the same office for a like purpose, and from this we have hereinbefore quoted."

The court therefore refers to the period between 1857-1864 (being seven and not seventeen years), and says that the circular of 1857 furnishes the contemporaneous construction of the provision under consideration. Here the court is referring evidently to unsurveyed lands. But it is obvious that there is no difference in the construction of the law as evidenced by the two circulars cited. The latter is more specific than the earlier one, the necessity for the same perhaps being demonstrated by the experience of the Land Department. The earlier circular substantially quotes the provision of the act, that when the scrip may be located upon unsurveyed lands outside of the reservation on which the Half-Breed has improvements the application shall be accompanied by a diagram and description denoting the natural objects and distances so as to fix with certainty the exact locality wanted, and yet in the mind of the court the diagram and description required by regulation of the Land Department was of greater importance than the fact plainly apparent from the circular and its construction relative to applicants to locate lands on which, as required by the act itself, the Half-Breed has improvements. Obviously if the applications were made for unsurveyed lands upon which the Half-Breed did not have improvements, there would be no necessity for the "diagram and description" because if the fact appeared the local officers would be bound to reject it as for a class of lands not subject

to location. The court also refers to the circular of 1864, and says, "In this circular it is stated that where a Half-Breed for himself may make actual settlement his improvements will be notice on the ground to any other settler." From the provisions in these two circulars together, then it is that the court concludes that improvements were required simply as notice to third persons.

Looking at the circular of 1864 we find the heading "Application of Scrip to general localities," and under this head the classification of the lands subject thereto in their order, viz: * * * * "upon any other unsurveyed lands not reserved by Government upon which they have respectively made improvements" * * * * then follow the instructions above quoted. Certainly the language of the circular containing such words and phrases as "the Half-Breed for himself," "actual settlement," "improvements," "any other settler" cannot be cited as meaning that improvements are only necessary for the purpose of giving notice to others of some prior claim and hence are not required at all if perchance no settlers should happen to go in the neighborhood of the lands located. Certainly the court's construction of these two circulars is most unwarranted as well as the conclusion which it draws from them.

Is it possible that Congress intended that this location should be good when made and yet be liable to be defeated at any indefinite period of time thereafter, upon the claim of some settler that he did not have notice; and if such a claim were made would it be a question of actual notice or would the improvements be the only possible means of affording the notice? Suppose that the Half-Breed had the lands staked out and notice of claim posted all over the same, would it still be competent for him to show that the would-be settler had, by these means, actual notice of his claim or must he show improvements no

matter how much actual notice the settler had? The court then has construed this provision not in accordance with its known object, the protection of the Indian or of the Government, but for the benefit of third persons. Why, applying the reasoning of the court as to the provisions against assignability, could Congress not have provided some efficacious and simple mode of giving that notice instead of requiring improvements, which at best, upon unsurveyed lands, would be of a slight and unsatisfactory character. If the object of the provision were notice, suppose that the Half-Breed made improvements, got his location, but allowed the improvements to fall into decay or be destroyed. This might readily be the case, if they were, as the court suggests they might be, under the act, neither of a reliable or permanent character or of a character either to evidence settlement, which the court says is not necessary, nor accompanied by residence or habitation. If the Indian goes upon the ground, not with a view to settlement, residence or cultivation of the land, of what character and how extensive must these improvements be; it being borne in mind that their sole object would be to procure the location of the scrip? Would the clearing of a half acre of land one year, and allowing it to go to waste forever after; the erection of a tepee, such as is used by Indians in their hunting or berry picking trips, with no thought of permanent residence which would be allowed to decay and fall into ruin immediately after the location is made, be sufficient? How efficacious would such means be and what would be the character of the controversies in the Land Office if such issues were to be tried? It is clear that the court has been misled into "roaming at large in the boundless field of speculation" regardless of the explicit language of the act, the known policy of Congress and the most authentic means of discovering what

that policy was, if in the mind of the court there was the slightest ambiguity. We have endeavored to present a few reasons why the conjecture of the court, that the clause requiring improvements on unsurveyed lands was simply a measure of protection to third persons, is untenable. We have already referred to the policy of Congress with reference to these unsurveyed lands and have discussed elsewhere in our brief much that is pertinent here, but at the risk of repetition we shall present a few suggestions in answer to the theory of the court.

Two great distinctions have always been made until recent years, viz., (1) Between offered and unoffered lands, and (2) Between unsurveyed and surveyed lands. It is with the last distinction that we have to deal. In July, 1854, when the act in question was passed, unsurveyed lands were not subject to sale and disposition. They are not so subject today. With the exception of location with a very few classes of scrip, of which this Sioux Half-Breed scrip is one, allowed by Congress in terms to be located upon unsurveyed land, there is no method by which they can be acquired. There is no general law under the provisions of which they can be appropriated. The act providing for the issuance of valentine scrip, April 5th, 1872, 17 Stat. 649, Instructions, Copp 806, which may be located upon surveyed or unsurveyed land, does not require that there should be improvements, upon land of either class located. In the act of June 4, 1897, providing for relinquishments of lands within the limits of Forest Reserves, and the selection of other lands, surveyed or unsurveyed, in lieu thereof, no reference is made to improvements. The exchange of lands provided for in these acts, it will be noted in passing, are of lands held by the beneficiaries in fee simple absolute. The quantities involved, at least under the later act, are many times larger than in the act of 1854. Yet it was not considered necessary, by legislation

or regulation, to require that improvements should be made in order that intending settlers might be warned of possible conflict. At the present time and at the date of the passage of the act relating to Forest Reserves, settlements upon unsurveyed lands are and were freely recognized, to the extent of giving to the settler as against every one but the Government, the preferred right to acquire the land settled upon, if they should thereafter be surveyed and become subject to disposition. At this later time the public lands available to settlement are immeasurably less, and the demand for them many times greater than in 1854, and the danger of conflict proportionately increased, yet no provision is made in either of these acts for giving notice by means of improvements upon the ground for the protection of the intending settler.

It must be then, that Congress in the act of 1854 was designating a class of public land upon which the scrip could be located. It had already designated two classes, viz:—(1) Lands within the reservation not occupied by actual and bona fide settlers, and (2) Any other unoccupied land subject to pre-emption or private sale. The third class is "any other unsurveyed land, not reserved, upon which they have respectively made improvements." This does not confer the power or right to locate the scrip upon any unsurveyed land, but only upon such unsurveyed land as the beneficiaries shall have made improvements upon. The power then was not a general property of the scrip but a right attaching only under certain circumstances and these were the same circumstances that induced Congress to protect the settlements and improvements of settlers who had gone upon the public lands in advance of the surveys, by giving them a preference right to purchase the lands occupied by them, when they should be brought into the market. The purpose of the act therefore must have been to protect such of the Half-Breeds as had left the reserva-

tion and occupied and improved unsurveyed lands by permitting them to use so much of their scrip as might be necessary to acquire the lands occupied by them, the residue, if any, to be located as they might please upon surveyed land subject to pre-emption.

In dismissing this branch of the argument we may remark, that we are surprised that the court with reference to the clause against assignability should tear down the rules and regulations as not being in accordance with the language of the act and yet with reference to the clause as to location upon unsurveyed land turn away from the clear language of the statute to these very rules and regulations to ascertain what the language means.

At this point we may call attention to a further statement in the opinion of the court from which we quote as follows:

> "Nor need we stop to consider why Congress saw fit to declare that the scrip should not be assignable and yet fail to deprive the scripee of the power of alienation after the location and in pursuance of a bargain previously made."

When the court says "yet fail to deprive the scripee of the power of alienation * * * * * * in pursuance of a bargain previously made" it assumes the whole question that is before it for decision, and does so in the face of its own prior decision in the case of Gilbert vs. Thompson, not to mention other cases.

It is not to be expected that Congress after clearly indicating its policy by the clearest and most explicit language should go further and attempt to anticipate and enumerate every particular means or device whereby that policy might be evaded and prohibit resort to them by name. Congress never does this; it is the function of the Land Department to carry out the policy of an act by appropriate rules and regulations suited to the exigencies of the

case, and when the court says that we need not stop to inquire why Congress "failed to deprive the scripee of the power of alienation immediately after the location", we would remark that if it had stopped to inquire, it would have found a conclusive answer to its inquiries not only in much which we have before collected and presented in this brief, but in decisions of its own court, to say nothing of the decisions of the Supreme Court of the United States. We refer to the case of Dole vs. Wilson, 20 Minn., 356 (Gil. 308), which construed a treaty that provided that certain Chippewa Half-Breeds should have the privilege of selecting under the direction of the president each eighty acres of land "which should be secured to them by patent in the usual form." There was no clause restricting alienation of either this right of selection or of the lands after the selection was made. Certificates of identity or scrip were issued, and the court says, with reference to an attempt to assign the same or rights thereunder, "the entries which * * * the parties named in the scrip were thereby authorized to make were entries of lands "to be selected by them" in the language of the seventh sub-division; that is to say, the privilege of each Half-Breed to select eighty acres of land was a personal right, and therefore the scrip, issued as the evidence of the right, was non-assignable. And if we turn to the meaning of the language "to be secured to them by patent" we find that the Supreme Court of the United States in Fee vs. Brown, 162, U. S. 602, holds that as the lands taken under these selections by the Chippewa Half-Breeds "were to be secured to them by parent in the usual form" that the right to alienate the land was not given until after the issue of the patent. In this case the device of the two powers of attorney was resorted to as in the present case.

The answer to the inquiry which the Court says it need not make, is that Congress intended to restrict the highly

personal and very valuable privilege of acquiring lands by means of the scrip to the original beneficiary. It was because Congress desired to make it more valuable to the Indian and of no value to the speculator that the restriction upon alienation was imposed prior to location.

The court also discusses at length, although it says it does not consider it necessary, the point that the adjustment of the location of the scrip in question to the survey operated as a new location upon surveyed lands and holds that it did so operate. The reasoning by which the court arrives at this conclusion seems to us surprising. The moment that the location was allowed the lands became segregated and not subject to entry by any other person. With reference to the rights of individuals, no adverse right of any kind could attach because the lands were segregated. Eaton went to the Land Office after the survey, and asked, as shown by the record and his pleadings, to have the location adjusted to the survey; not to have a new location made as upon surveyed lands. How there could be a more flagrant case of a person taking advantage of his own wrong, we do not see. After holding his fellow citizens off by his wrongful acts as stated, to then be allowed to go to the Land Office after the lands were surveyed, wipe out all that was passed and have the adjustment allowed as a new location because "no valid adverse claim had intervened," when by force and fraud he had prevented any claim of any kind upon the part of an individual intervening, seems to us a remarkable proposition and not at all in accordance with the policy embodied in our public land system or the general principles of law. It is in conflict utterly and entirely with the principle that the title when perfected takes effect by relation as of the date of the initial act. But more than this the valid adverse interests of the United States intervened and of this the court seems to have entirely lost sight. Knight vs. United States Association, 142 U. S., 161.

See also Weeks vs. Bridgman, 159 U. S. 541.

The court further says:

> "It is urged that Eaton's entry amounted to "evasion of that part of the law which forbade "an assignment of the scrip, the well-known rule "being evoked that an act which cannot be done "directly cannot be accomplished indirectly. But "if an agent can be authorized by the scripee to "do all acts that may be necessary as a condition "precedent to a location and may also be author- "ized to carry the scrip to the Land Office and "complete the entry, and this it is well settled, "may be done, why is not the prohibition evaded "quite as completely as the Secretary claimed it "was in this case?"

In this part of the opinion the court proceeds upon the theory that the scrip evidenced a personal right; that agency was necessary to locate the scrip, if the principal did not himself locate it, and upon this theory holds that there was no evasion of the statute by Eaton.

Eaton's agency was certainly a remarkable one. Think of an agency (which involves the element of *delectus personae*) to do such important things as to select land for a principal, to sell that land and account to the principal for the proceeds, being created by an instrument executed in blank, parted with for a consideration and sent broadcast over the country into whose-soever hands it might fall, neither the so-called agent nor the so-called principal ever expecting to see or hear from each other. Think of an agency, which implies compensation from the principal to the agent and doing the best possible for the principal's interest, created by a third person and stranger to the principal, who goes to some other third person or broker, also a stranger, and pays for the privilege of being agent, and for the express purpose of acting solely for his own interests.

In this connection we may note that no where in the opinion or syllabus, is there any statement as to what Eaton did. A stranger to the record is entirely in the dark as to what facts are being passed upon by the court as constituting an evasion or otherwise, and the court instead of meeting the question in Eaton's case, refers to some other case, and without telling us what Eaton did inquires why, if something else could be done, Eaton could not do what he did.

The case assumed by the court with which Eaton's case is compared was that of a bona fide agency; not as in the case at bar, a device to evade the law.

Whatever is done in fraud of law is in violation of it, as evading a statute. Lee vs. Lee, 8 Peters, 44.

In the United States vs. Trinidad Coal & Coking Company, 137 U. S. 160, this court says, "This contention cannot be sustained unless the court lends its aid to make successful a mere device to evade the statute. * * * * There is consequently in view of all the allegations of the bill, no escape from the conclusion that the lands in question were fraudulently obtained from the United States. We say fraudulently obtained, because, if the facts admitted by the demurrer had been set out in the papers filed in the Land Office, the patents sought to be cancelled could not have been issued without violating the statute. The defendant would not have been permitted to do indirectly that which it could not do directly. * * * * It is the case of an association seeking to evade an act of Congress by using, for its own benefit, the names of both its members and employees to obtain from the Government, vacant coal lands which it could not legally obtain upon entries made in its own name."

In Fee vs. Brown, and Felix vs. Patrick, (supra), this court applies the principles enunciated in the above cases,

to the use of two blank powers of attorney, as in the case at bar, and characterizes it as a fraud upon the act, a fraud upon the Indian, a palpable scheme to evade the provisions of the law against the assignment of the scrip, and against the letter and policy of the law.

In this connection the court also says:—

> "Locations under such circumstances have been repeatedly, almost universally upheld."

That is to say, locations by a bona fide agent or one whose faith the Land Department had no cause to suspect. This remark has no bearing on the case at bar.

But further the court says:

> "The officials of the Land Department declaring, however, that the scripee cannot assign the scrip, that location must be in the name of the person to whom the same was issued and that the patent must be so issued, but further holding that as the power to alienate is unrestricted by the law, an agreement to sell is not a matter for determination in the Land Department. It seems very apparent that the effect and validity of such an agreement must be left to the arbitrament of the courts and not to the decisions of the Government officials."

The officials of the Land Department never held that "the power to alienate is unrestricted by law." On the contrary the officials have always held that the power to alienate was so restricted that no possible right could be conferred by such an agreement made before location.

It is probable, as the case of Felix vs. Carroll, decided by the Assistant Secretary of the Interior in 1863, (a copy of the decision in which is appended to this brief), was referred to in the memorandum of the trial court and relied on by the attorneys for the defendants, that the court had

this case in mind as authority for the statement above quoted. No other case was referred to upon this proposition, either by the trial court or upon argument.

This case was so strongly relied upon by the defendant that we have taken the trouble to procure a certified copy of the record from which the following appears:—

The land involved was the north half of the southeast quarter and the southeast quarter of the southeast quarter of section nine, township fifteen north of range thirteen east, Omaha District, Nebraska.

It was located November 21st, 1861, by Sophia Felix with Sioux Half-Breed scrip No. 181 A. and 181 C., issued to her under the act of July 17, 1854. This land had previously been claimed by one Patrick, whose claim was rejected, and also by Carroll, as a pre-emption.

On July 30th, 1862, Patrick's claim was finally rejected by the Secretary of the Interior, who held, that patents for the land should issue to Felix unless her right should be challenged by Carroll. The Commissioner of the General Land Office, carrying into effect the Secretary's said decision, on August 26th, 1862, instructed the land officers at Omaha, Nebraska, to notify all parties interested, of the Secretary's said decision and to inform Mr. Carroll that he had thirty days from date of notification to take such steps as he should be advised, to show the invalidity of the Felix location. Carroll accordingly appeared at the Land Office and, commencing on October 27, 1862, submitted evidence of persons residing in the neighborhood of the claim tending to show that Felix had never resided upon the land. There was no evidence offered to show that the location was not made by her and for her own benefit.

At the request of Carroll's attorney, however, the register reported that (the black letter being our own) "the location in the name of Sophia Felix was not made by said

Sophia Felix in person, but by one Augustus Kountze of Omaha, for the benefit, **as I believe,** of M. T. Patrick."

The Commissioner of the General Land Office on December 15th, 1862, considering the case presented at the trial, decided against the location on two grounds, viz:

1. That at the date of the location Felix was not a resident on the land.

2. That it is "shown by the statement of the Register, "that although the scrip appears to have been located by "said Sophia Felix, yet in fact it was not located by her, "but by one Augustus Kountze, and, **as the Register be-"lieves,** for the use and benefit, not of the Half-Breed, "Sophia Felix, but of M. T. Patrick, a former claimant to "the land."

Upon this record, the Assistant Secretary disposes of the first objection of the Commissioner, upon the ground that, as the land was surveyed, no residence or improvements were required. As to the second objection the Assistant Secretary holds that as Felix had signed the application to locate her scrip and "as the certificate of location "issued in her name, and the patent will issue to her, neith-"er the **Register's report** or the **affidavits** of third parties "can be admitted to establish the interest of any other "person in the location. We could not recognize such inter-"est if an assignment in writing was produced and duly "proved to have been executed by the Half-Breed—whether "she could sell or did sell the land **after** the location of her "scrip, we need not inquire, and the validity and effect of "any **such** sale or assignment must be left to the arbitra-"ment of the courts of law."

This decision of the Assistant Secretary was made after full hearing, upon notice to all parties in interest, and it will be observed that there was nothing in the evidence submitted at the trial to show, or even indicate, that the location of Felix was made in the interest of any third per-

son, and the Secretary merely refused to consider the ex-parte affidavit of Carroll (filed after the trial) and the belief of the Register, which could not properly be considered as showing that such was the fact.

On the facts of this case, as disclosed by the record, it is directly opposed to the statement of the Court. But if anyone could have been misled by this unreported decision (which appears not to have been discovered by the defendants until the hearing on the motion for review before the Secretary in the Eaton case) certainly the circular of the following year (1864) requiring proof that the reservee is living and that the location is made for his sole use and benefit, would remove any misapprehension.

The regulations of the Land Department have all the force of law. Germania Iron Company vs. United States (U. S. C. C. A.) 58 Fed. Rep., 334, at page 336.

The court then proceeds: (The black letter being our own.)

> "It seems very apparent that the effect and validity of **such** an agreement must be left to the arbitrament of the courts and not to the decision of the Government officials."

The court does not tell us whether the agreement it refers to is one made before or after location. If the court means an agreement **before** location we know in advance that the courts would not enforce it. (See Gilbert vs. Thompson, supra, and other cases cited.) And if it refers to an agreement to sell **after** location, it is stating a proposition of law that is not involved in this case, and concerning the soundness of which there has never anywhere been a question.

But it seems apparent that the court's attention is diverted from the real point in this case, to a consideration of the rights of two parties, *sui juris*, as between themselves growing out of a sale or agreement to sell.

In all the cases which have been before the courts patents have been issued and the matter has passed beyond the jurisdiction of the Land Department. The Government has never been a party to any of these actions and where the Half-Breed has been a suitor his right has been recognized as being originally valid but barred because of his own laches.

And note the remarks of the Supreme Court of Minnesota in Dole vs. Wilson, 20 Minn., 313, where the suit was between two white men, one of whom tried to show that the policy of the act of Congress in the matter of the non-assignability of Chippewa Half-Breed scrip had been evaded. The court said:

> "It is possible that the defendant may be able to plead and prove facts, showing that the transactions between plaintiff and defendant were not only evasive, but subversive of the policy of the Government under the treaty before mentioned. **Whether such showing would not be overcome by proof of the issue of the patents by the United States,** is a question which suggests itself."

Does the court mean to hold in one case, it being conceded that there is a particular policy which should be enforced somewhere, that the Land Department cannot inquire into the matter, that it must be left to the courts; and in another case, that the courts cannot inquire into it because the Land Department has investigated and passed upon it, and that that is conclusive?

The language of the United States Circuit Court of Appeals, in Germania Iron Company vs. United States, 58 Fed. Rep. 338, seems appropriate in this connection and we quote it:

"The United States, in disposing of the public "domain through the action of its Land Depart- "ment, cannot be relegated to the position of an "ordinary private vendor of land. As has been "frequently declared in substance, the Government "is clothed with a trust in respect to the pub- "lic domain. It is charged with the duty of pro- "tecting it from trespasses and unlawful appro- "priation, and likewise with the duty of enforcing "the laws, which have from time to time been en- "acted by Congress, describing the terms and con- "ditions upon which individuals may acquire a "title to portions thereof."

The court does not seem to have discussed or more than referred to the question of alleged ratification by the Half-Breed of the acts of Eaton, her so-called attorney. This so-called ratification (evidently procured, as the Secretary states, upon the payment of some consideration just before the hearing) obviously could have no effect in conferring upon Eaton the title to land which the Half-Breed herself did not have or in disposing of the claim of the United States. Moreover the testimony of Eaton himself was, that the so-called ratification was a part of the original scheme. (Record 111-114.)

Further the court says:

"There was no forfeiture of the scrip by the previous attempt to locate. If invalid it was nothing but an attempt."

The Land Department cancelled only the location whereby a misappropriation of public lands and misuse of the scrip were at once prevented, and as hereinbefore stated, the scrip was subsequently taken by the heirs of Orillie Stram and located upon other lands. The action of the

Land Department seems therefore to have been effectual for all purposes.

We dissent from the argument of the court based upon the proposition that if the location of the scrip was invalid "it was nothing but an attempt", for there were present the intention to commit a fraud accompanied by the means of commission. It was actually consummated, and from the date of the location of the scrip, June 16th, 1883, Eaton, his associates or grantees have been, and now are here in court, claiming the benefit of it.

We have now reached that part of the opinion where the court specifies error of the Secretary. It says:

> "Our conclusion is, that upon the facts as found, hereinbefore stated, the Commissioner of the Land Office and the Secretary of the Interior erroneously construed the law and imposed unwarranted conditions. The decision of the latter appears to have been predicated upon a circular of instructions, not upon a statute."

The court has recited, it is true, a part of the decision of the Commissioner of the General Land Office, but it has no where stated the findings of the Secretary of the Interior, or even the ultimate facts found by him. The decision speaks for itself. (Record, p. 63-81.)

In the light of this decision and that in Allen vs. Merrill, 8 L. D. 207, therein referred to, we cannot understand how the court could have arrived at its conclusion.

The court finds that,

"It was error to hold that under the act in question it was vital that the scripee should see the land or improvements prior to the entry and that an agent could not act in her behalf when duly authorized, not only in selecting the land itself but in making such improvements as would in themselves and without regard to their value, be notice on the ground of the assertion of a prior right."

The Secretary did not hold that an agent could not act in behalf of a Half-Breed when duly authorized in selecting land. The rules and regulations of the Land Department provide otherwise and the decision of the Secretary in Allen vs. Merrill, which is made a part of its decision in this case, expressly recognized the right of a Half-Breed to employ an agent to select land.

He **did** find that Eaton was **not** the agent of the Half-Breed, duly authorized or otherwise. In this assignment of error then, we find it again apparently recognized that there must be a bona fide agent duly authorized acting "in her behalf" and all that we can definitely extract from this assignment is first, an utter misconception by the court of the purport of the Secretary's decision, and, second, a holding that the object of improvements upon unsurveyed lands was to give notice to third persons.

The court then proceeds with this statement:

"And if by his decision that the scripee must claim the land for her own personal use the Secretary meant that such claim must be formally made or made in *good faith* or must be established by proof other than or different from that before the Land Department in this particular case, he was in error."

The idea that an asserted claim should not be made in good faith, strikes us as novel. And the further idea that such claim need not "be established by proof other than or different from that before the Land Department in this particular case" when it is remembered that this proof was confessedly false, seems not in harmony with the rules and objects of evidence as generally understood and applied, nor can we see why the court in the light of the decision of Allen vs. Merrill and Hyde vs. Eaton, should have found any difficulty in ascertaining just what the Secretary meant and what the reasons for his decision were.

The court adds:

> "That there was not an intimation in the law that the scripee should personally inspect or select the land or should make in person or even examine the improvements."

The language of the act of Congress was "upon which they have respectively made improvements." And the regulations of the Land Department were merely for the purpose of ascertaining that they and not some speculator had made them.

The court then proceeds with the same argument, that it has before used, as to the scrip being issued to minors and the aged and that it could be of no benefit to them unless they were allowed to dispose of it, and further says: "The Secretary erred in holding upon the facts as found that the scripee had no interest whatever in the location made by her attorney in fact."

In the face of the findings of the Secretary and the evidence before him including that of Eaton himself, we cannot argue this matter. It is not matter for argument.

Before making the last assignment of error the court makes the following ruling. It says: "We hold that on the facts and the law the location in behalf of Mrs. Stram was proper and valid."

It will be borne in mind that the facts have never been stated.

The court treats the entry as that of Mrs. Stram, but it was Eaton's entry and that was the trouble with it.

Finally we reach the last assignment of error. It is to the effect that the title passed out of the United States by virtue of the location, as the act of July 17th, 1854, did not require a patent; consequently the matter passed beyond the jurisdiction of the Land Department, which had no right to assume a supervisory power in the matter.

The grounds upon which the decision of the Supreme Court of Minnesota rests, are then,

First. That the scrip in question did not evidence a personal right in the Half-Breed and that any third person could acquire the beneficial interest evidenced by it.

Second. With reference to unsurveyed lands, that no improvements need be made by the Half-Breed; they need not be made at all, unless as notice to possible settlers on the same tract; that in any event they could be made by a third person who had purchased the scrip, for his own benefit and as a means to procure the location of the same.

Third. That the adjustment of the location to the lines of the Government survey, operated as a location *de novo*, as of surveyed lands, and thus, in any event, rendered improvements unnecessary.

Fourth. That both in the matter of making improvements and the location of the scrip, Eaton was the duly constituted agent of the Half-Breed and was acting for her benefit; and that thus the prohibition against the assignment of the scrip was not violated.

Fifth. That the procurement and use of two blank powers of attorney in connection with the scrip, as in the case at bar, did not constitute an evasion of the statute.

Sixth. That it mattered not, in any event, how fraudulent Eaton's location might in fact have been; the Land Department had no jurisdiction to inquire into it, or to cancel the location, because the title had passed out of the Government upon the location, no patent being necessary.

We feel at liberty to say, that if the court had prepared a syllabus as prescribed by Section 4826 of the Revised Statutes of Minnesota, embodying the principles settled by its decision, that the conflict between the principles therein announced, and the authorities to which we have referred, would have been apparent even to those unfamiliar with the record.

It also seems apparent (unless our conception of the purport and effect of the authorities which we have cited to the various propositions discussed, is utterly erroneous) that the decision complained of, is most serious and far reaching in its effects.

The case at bar involved what the Supreme Court of Minnesota upon the oral argument appropriately characterized as "vast interests." But we think that beyond this, all titles depending upon patents from the United States Government, (the "immense importance and necessity of the stability" of which, is adverted to in the Maxwell land

grant case, 121 U. S. 325, and other cases in this court), as well as titles dependent upon the principle of *stare decisis*, are involved in the present case.

The argument *ab inconvenienti* of the trial court, (set forth in its memorandum at the bottom of page 299 of the record) where reference is made to many patent titles having been secured by means of Sioux Half-Breed scrip, which would be jeopardized if the action of the Land Department in this case were upheld, and which may have influenced the Supreme Court of Minnesota, does not appeal to us. We suppose that many thousands of so-called titles have been overthrown by the Land Department in the exercise of its jurisdiction prior to issuance of patents, in the matter of cancelling fraudulent, or invalid entries upon the public lands. The result of the decision complained of would be, in principle at least, to reinstate thousands of these cancelled entries and render a patent title from the United States Government absolutely unreliable and untrustworthy. But even if the Court's premise be true, as we hope it is not, that the act of Congress in question had been uniformly and successfully evaded (which evasion was in violation of the regulations of the Land Department and with the aid necessarily, since 1864, at least of perjury), we think that its fears as to titles resting upon patents in the hands of bona fide holders, are groundless. Except by the Government, the Half-Breed or a person claiming prior equities, the title is and always has been impregnable to attack. If after the patent issues, suit be brought by the Half-Breed he is bound by the same rules of law with reference to estoppel, laches, limitation and bona fide purchasers as any other litigant, as witness the cases of Coursolle vs. Weyerhaeuser and Felix vs. Patrick, supra.

If the Goverment is to be the party complaining, after the issuance of patent, it can bring no suit to set aside any

patent issued prior to 1891, unless the suit be brought within five years from March 3rd, 1891, and it can bring no suit to set aside any patent issued after that date or thereafter to be issued, unless the suit is brought within six years from the issuance of the patent (Act of March 3rd, 1891, 26 Statutes, pages 1095-1099, amending Section 2301 of the Revised Statutes.

In no event can the Government set aside a patent when the lands have gone into the hands of a bona fide purchaser for value. Col. Coal Co. vs. U. S., 123 U. S., 307.

There are doubtless very many cases of cancellation of locations of Sioux Half-Breed scrip the decisions in which are not published because the cases have not gone on appeal or otherwise to the Secretary of the Interior.

But after all, the argument of the trial court is directed necessarily, only to the question of how long, and to what extent must a fraud be successfully perpetrated, to establish it as legal, preclude inquiry even though it is still *in fieri*, and secure to the wrongdoer the fruits of its consummation.

The plaintiff in error bought the lands in controversy from the patentee of the Government, and it is the title thus derived, which by the judgment complained of, is decreed to be held in trust for Eaton, his associates and grantees, under their claim of a successful evasion of the statute.

The fact that four of the five justices of the Supreme Court of Minnesota (Mr. Justice Lewis not sitting because he had been of counsel in the case) concurred in the opinion, does not shake our conviction as to the error of the court. The decision seems to be out of harmony with the general principles of law and equity and in it's immediate results as well as the logical conclusions flowing from it, to render

property rights insecure, and we have felt at liberty to analyze and discuss the decision in question with the same freedom as though it had not been rendered in this case.

We respectfully submit that the plaintiff in error is entitled to the relief demanded in it's complaint and that the judgment of the Supreme Court of Minnesota should be reversed.

WALTER AYERS,
Attorney for Plaintiff in Error.

P. H. SEYMOUR,
Of Counsel.

INDEX TO APPENDIX.

Appendix A.	Act of July 17th, 1854, (bottom paging),	1–2
Appendix B.	Amendatory Act of May 19th, 1858, -	3–4
Appendix C.	Report accompanying Bill for Act of July 17th, 1854, - - -	5–27
Appendix D.	Circular of March 21st, 1857, -	28–31
Appendix E.	Circular of February 22nd, 1864, -	32–36
Appendix F.	Form of Sioux Half-Breed Scrip, -	37–38
Appendix G.	Decision in Felix vs. Carroll, - -	39–41
Appendix H.	" " Murphy vs. Jones, -	42–44
Appendix I.	" " Allen vs. Merrill, - -	45–56
Appendix K.	" " Allen vs. Merrill, on review,	57–68
Appendix L.	" " Hyde vs. Eaton, on review,	69–71
Appendix M.	Brief for Appellant in Gilbert vs. Thompson.	
Appendix N.	Brief for Respondent in Gilbert vs. Thompson.	

APPENDIX.

APPENDIX A.

(10 Stat. 304.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the President be, and he is hereby, authorized, to exchange with the Half-Breeds or mixed bloods of the Dacotah or Sioux nation of Indians, who are entitled to an interest therein, for the tract of land lying on the West side of Lake Pepin and the Mississippi River, in the Territory of Minnesota, which was set apart and granted for their use and benefit, by the Ninth article of the Treaty of Pririe du Chien, on the 15th day of July, One Thousand Eight Hundred and Thirty; and for that purpose he is hereby authorized to cause to be issued to said persons, on the execution by them, or by the legal representatives of such as may be minors, of a full and complete relinquishment by them to the United States of all their right, title and interest, according to such form as shall be prescribed by the Commissioner of the General Land Office, in and to said tract of land or reservation, certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the said grant or reservation pro rata among the claimants—which said certificates or scrip may be located upon any of the lands within said reservation not now occupied by actual and bona fide settlers of the Half-Breeds or mixed-bloods, or such other persons as have gone into said territory by authority of law, or upon any other unoccu-

pied lands subject to pre-emption or private sale, or upon and other unsurveyed lands, not reserved by Government, upon which they have respectively made improvements: Provided, that said certificates or scrip shall not embrace more than six hundred and forty, nor less than forty acres each, and provided that the same shall be equally apportioned, as nearly as practicable, among those entitled to an interest in said reservation: And provided further, that no transfer or conveyance of any of said certificates or scrip shall be valid.

Sec. 2. And be it further enacted, that the President be, and he is hereby authorized, to cause to be ascertained the number and names of the Half-Breeds or mixed-bloods, who are entitled to participate in the benefits of said grant or reservation as aforesaid, before the issue of the certificates or scrip provided for in the preceding section.

Sec. 3. And be it further enacted, that from and after the passage of this act, the President is authorized to have the lands within the said reserve surveyed, and exposed to public sale at the Land Offices for the districts in which said lands may lie, according to the boundaries of the several land districts recently established by Congress, in the same manner as other public lands.

Approved July 17, 1854.

APPENDIX B.

(11 Stat. 292.)

An act to amend an act entitled "An Act to authorize the President of the United States to cause to be surveyed the tract of land, in the Territory of Minnesota, belonging to the Half-Breeds or mixed-bloods of the Dacotah or Sioux nation of Indians, and for other purposes," approved seventeenth July, eighteen hundred and fifty-four.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the act approved seventeenth July, eighteen hundred and fifty-four, above referred to, chapter eighty-three, be, and the same is hereby, amended, so that the body of land known as the Half-Breed tract, lying on the west side of Lake Pepin and the Mississippi River, in the Territory of Minnesota, and which is authorized to be surveyed by the said act of eighteen hundred and fifty-four, shall be subject to the operation of the laws regulating the sale and disposition of the public lands; and settlements heretofore made thereon are declared valid so far as they do not conflict with settlements made by Half-Breeds, and that the settlers shall have the benefit of the pre-emption laws of the United States, any location of Half-Breed scrip thereon, after the date of settlement, notwithstanding; Provided, The declaration of pre-emption be filed within three months after public notice is given of the passage of this act in proper land district; And provided, That when two or more persons have settled on the same quarter section, prior to the passage of this act, they shall be permitted to enter the same, and the rights of each shall be determined according to the provisions of the act relating to pre-emptions, passed March third, eighteen hundred and forty-three.

Sec. 2. And be it further enacted, That the provisions of this act shall not extend to any tract or subdivision, within the body of land aforesaid, which shall have been settled upon in good faith by, and is in the occupancy of, any of the said Half-Breeds or mixed-bloods; which lands, so settled upon and occupied by the Half-Breeds, are hereby expressly declared to be subject to no other disposition than location by the "certificates or scrip" authorized to be issued by the said act of eighteen hundred and fifty-four, for the benefit of said Indians. Nor shall the provisions of this act extend to any lands which may have been located prior to its passage with Half-Breed scrip, with the consent of the settlers thereon.

Approved, May 19, 1858.

APPENDIX C.

33d Congress, 1st Session. — Ho. of Reps.

REP. NO. 138.

SIOUX LANDS OR RESERVATION IN MINNESOTA TERRITORY.

(To accompany bill H. R. No. 338.)

APRIL 28, 1854.

MR. DANIEL B. WRIGHT, from the Committee on Indian Affairs, made the following

REPORT.

The Committee on Indian Affairs, to whom was referred the memorial of the Sioux Half-Breeds, having considered the same, beg leave to report:

That under the treaty of Prairie du Chien, of date July 15, 1830, and the ninth article of said treaty, it was stipulated and agreed between the United States and the Sioux bands of Indians, that said Indians might have permission to bestow upon the Half-Breeds of their nation the tract of land within the following limits, to-wit: "Beginning at a place called the Barn, below and near the village of Red Wing chief, and running back fifteen miles; thence in a parallel line with Lake Pepin and the Mississippi about thirty-two miles, to a point opposite O'Boeuf river; thence fifteen miles to the grand encampment opposite the river aforesaid"—the United States agreeing to suffer said Half-Breeds to occupy said tract of country; they holding by the same title and in the same manner that other Indian titles are held.

And in the tenth article of said treaty it was further agreed that the President of the United States might thereafter assign to any of the said Half-Breeds, to be held by him or them in fee simple, any portion of said tract not exceeding a section of six hundred and forty acres to each individual.

Said tract of country thus assigned to said Half-Breeds lies in the southern part of the Territory of Minnesota, on the western side, and at the head of navigation of the Mississippi river; it contains, by estimation, three hundred thousand acres, and includes within its limits some of the most fertile lands in the Territory of Minnesota.

The Indian titles to the whole of the country surrounding said reservation are now extinguished, and the bands to which said surrounding country belonged have removed westward, and many of the less cultivated of said Half Breeds are desirous of disposing of their interests in said reserve and following their Indian relatives. Some have already gone. Justice, humanity, and sound policy alike second their desire; for all experience demonstrates the utter incompatibility of the uncivilized Indian with civilized life. Many of them, however, are represented as being educated, and having judgment and experience sufficient to take care of their own interest. A number of them are said to be men of much intelligence, possessing property, and having become citizens of Minnesota and of the adjoining States. Some of them have served in the legislature, and filled offices of honor and trust in the Territory, while others are engaged in agriculture, mercantile and other profitable pursuits. With them, at least, the object of the fostering policy of the Government has been attained, in fitting them for civilized life; for, in point of intelligence and civilization, many of them would compare favorably with their white brethren.

The term "Half-Breed," as applied by some to them, is a misnomer, for it was intended to include all those having an admixture of white and Indian blood in their veins, in whatsoever degree.

The actual title of those persons to the reservation in question is that of Indians, although many of them have a preponderance of white blood. The title of the Indians must be considered with reference to their mode or habit of life. Their hunting-grounds are as much in their possession as are the cleared fields of the whites, and their undisputed right to exclusive enjoyment beyond dispute. Yet this is a right to possess or hold their lands as joint tenants, or as tenants in common; and no one of such community can dispose of an integral part of their common property, nor is any white citizen authorized to settle upon the same.

The laws and treaties of the United States contemplate the Indian Territory as completely separated from that of the States, and provide that all intercourse with them shall be carried on exclusively by the Government of the Union; hence the importance to the inhabitants of the Territory of Minnesota, that said reservation should be held in severalty by said Half-Breeds, with title in fee, or by their assignees, as citizens of the United States; for, under existing circumstances, they are deprived of the right of way for thirty-two miles on the Mississippi river—the natural outlet for their produce and commerce. Having no right to open roads through said reservation, the citizens of Minnesota are precluded the use of those natural advantages to which their position entitles them.

Said Half-Breeds have repeatedly applied to the Government of the United States to have their lands allotted to them in fee, as stipulated in the tenth article of said treaty; but the President has hitherto wholly failed to assign to said Half-Breeds their lands in fee, upon the ground,

as your committee is informed, that there was no stipulation in said treaty as to whether the said Half-Breeds should incur the expense of such allotment. Said Half-Breeds, in 1851, offered to take one hundred and fifty thousand dollars ($150,000) for their said reservation; but not being a tribe or nation in the legal sense of the term, they had no power to treat, and the proposition was rejected by the Senate of the United States; nor can their Sioux relatives treat for their Half-Breeds in relation to said reservation since they have parted with all the title they held to the same.

Said Half-Breeds, holding by the uncertain and precarious tenure of Indian title, have no inducement to improve their homes in said reservation; and thus the fairest portion of Minnesota bids fair to remain a desert, unless the stipulations of the treaty can be carried into effect.

Justice and sound policy alike require that this should be done. They look to our Government for protection, rely upon its kindness, invoke its humanity, and appeal to its power for relief.

Your committee having carefully considered the premises, and believing that the relief sought ought to be granted, report herewith a bill, which they think will attain the end desired, and recommend its passage.

DEPARTMENT OF THE INTERIOR.

Office Indian Affairs, March 4, 1854.

Sir: The 9th article of the treaty of the 15th of July, 1830, with the Sacs and Foxes, and certain tribes of the Sioux, &c., and which treaty was ratified on the 24th of February, 1831, is in the following words:

"Art. 9. The Sioux bands in council having earnestly solicited that they might have permission to bestow upon the Half-Breeds of their nation the tracts of land within

the following limits, to-wit: Beginning at a place called the Barn, below and near the village of the Red Wing chief, and running back fifteen miles; thence in a parallel line with Lake Pepin and the Mississippi, about thirty miles, to a point opposite Beef or O'Boeuf river; thence fifteen miles to the Grand Encampment opposite the river aforesaid,—the United States agree to suffer said Half-Breeds to occupy the said tract of country, they holding by the same title and in the same manner that other Indian titles are held."

The 10th article, after designating lands for the Half-Breeds of other tribes, parties to the treaty, contains the following proviso in respect to the various grants made:

"The President of the United States may hereafter assign to any of the said Half-Breeds, to be held by him or them in fee simple, any portion of said tract not exceeding a section of six hundred and forty acres to each individual, And this provision shall extend to the cession made by the Sioux in the preceding article."

The object of setting apart the individaul reserves above referred to for the Half-Breed Sioux, has, from the year 1836 until the present time, given rise to an extended correspondence between the Indian Department and the agents, attorneys, and friends, of the parties interested; but so far, to all appearance, the questions connected therewith are now as far from being settled as they were when first brought to the notice of the Indian Office.

In a letter dated the 25th of July, 1836, Lawrence Taliaferro, Esq., the then Indian agent at St. Peters, informed this office that the names of sixty-four Half-Breeds had been deposited with him, who stood prepared either to cede to the United States their reserve on Lake Pepin, or to receive a confirmation of title to the same, and a fair division among those entitled, under the provisions of the treaty of 1830. "This precautionary measure," he was requested to say, "had been adopted by the more intelligent half-breeds,

in consequence of learning that an attempt is about being made by one portion (a minority) of the claimants to defraud the majority out of their just proportion of the lands under said treaty, under the influence of certain white speculators."

On the 3d of March, 1837, an act of Congress was passed appropriating $1,000 to carry into effect the provisions of the 9th and 10th articles of the treaty of 1830; but the money does not appear to have been drawn from the treasury, for the reason stated by Commissioner Crawford in his report of the 7th of January, 1840, to Secretary Poinsett, that it could not be applied, without legislative authority, beyond running the exterior lines of the tract, which, it seemed to him, "could not have been attended with any advantage, as the body of the land is designated with precision in the treaty."

There is also on file a memorial dated at Fort Snelling, St. Peters, August 25, 1837, signed by Sioux Half-Breeds and their friends, asking the President to have the Half-Breed reservation at Lake Pepin "surveyed and divided among the proper claimants as soon as practicable," so that the intention of the treaty may be carried into effect, and that Governor Dodge, then superintendent of Indian affairs, and Colonel Stambaugh of Fort Snelling, or either of them, be appointed "to have the said lands surveyed and divided equitably between them as the treaty prescribes, believing that a division so made will give general satisfaction to all interested." They also appointed their friend, Col. S. C. Stambaugh, their representative at the City of Washington. An addition to the memorial made in this city, and dated the 27th of September, 1837, signed by, or on behalf of several Half-Breeds, asks that Colonel Stambaugh might be appointed to divide their reservation.

No action appears to have been had upon this memorial or its supplement.

In October, 1838, L. T. Pease and Wm. L. D. Ewing, who had been appointed commissioners to execute certain provisions of the Sioux treaty of 1837, transmitted from Fort Snelling, with their favorable recommendation, a memorial to Secretary Poinsett, signed by half and quarter-bloods of the Sioux nation, praying for the appointment of Alexis Bailly and Samuel C. Stambaugh, to make a division of the reservation among those entitled, and asking that half and quarter-bloods may participate equally in the benefit of the grant.

On the 7th of January, 1839, Commissioner Crawford reported adversely to the memorial to Secretary Poinsett; and the reasons for his conclusions will be found embodied in the following extracts therefrom:

"The first part of the request, (for a division of the reserve among the Half and Quarter-Breeds,) it appears to me, cannot be granted. The treaty limits the persons entitled to any interest in this reservation to Half-Breeds. There is no authority for making a different disposition of the land. * * * * * The treaty, it is apparent, contemplated equality of distribution among families; for it authorized the President to assign to any of the Half-Breeds a section of land, or six hundred and forty acres, and no more. This authority, by the way, does not seem to have looked to a general distribution even among the Half-Breeds, as the memorialists seem to suppose; for its language is, that the President may hereafter assign to any of the said Half-Breeds, to be held by him or them in fee simple, &c.; thus leaving it discretionary with him to grant to those to whom it would be beneficial, or for whose advantage, for any good reason, he thought fit to exercise the power.

"I also think the recommendation to Congress, which is asked for, to divide the remainder of the land upon

principles of equity among the memorialists, (Half and Quarter-Breeds,) ought to be withheld for the reasons given, against the first branch of the prayer, they being as strong as against the second.

"There is another, to my mind, great objection to all parts of the memorial, and the wishes expressed. The ninth article grants the reservation to the occupancy only of the Half-Breeds, who are to hold it by the same title, and in the same manner that other Indian lands are held. The fee simple is in the United States, and the whole will revert to them when the said Half-Breeds cease to occupy the property, unless the President, under the tenth article, should grant to some, or all of them, a section of land respectively in fee simple. So far he has authority to go. When he shall think fit to do so, depends upon his own view of the matter, and whether he shall do it at all; and the treaty is fulfilled whether his judgment leads him to the one conclusion or the other. But, having patented one section of land to each Half-Breed, all the grants in severalty contemplated by the treaty are made, and it is executed to its full and even contingent extent. The legislative authority can give the residue of the land to the Indians in fee, but I see no public good, or probable advantage to them, that would result from so doing."

Upon this report, Secretary Poinsett endorsed as follows: "I concur in the views taken by the Commissioner in this communication. J. R. Poinsett."

In a letter written by L. T. Pease, one of the late commissioners, and dated at Hartford, Conn., on the 22d of January, 1839, he assigns at length, at the request of Messrs. Stambaugh and Bailly, the various reasons which induced him to join his associate, Mr. Ewing, in recommending a division of the Half-Breed tract among those entitled. He urges with great earnestness the policy, propriety, and justice of the measure.

On the 25th of January, 1839, the Hon. James Buchanan addressed a letter to President Van Buren, enclosing one

from the Hon. James D. Doty, (also addressed to the President.) The object of these letters seemed to be to controvert the idea that the grants of fee-simple estates, contemplated by the treaty of 1830, to Sioux Half-Breeds, should be limited to those of half white and half Indian blood only. Mr. Buchanan expressed his astonishment at reading the opinion of Commissioner Crawford, and said he had always understood the term "Half-Breeds" meant neither more nor less than those of mixed blood, "without regarding the exact proportions." Such, also, he said, was the opinion of several members of the Senate practically acquainted with Indian affairs.

Mr. Doty said it was important to the interests of the frontier "that the Half-Breeds should be settled on the tract according to the intent of the treaty, and asked the appointment of some person to examine the tract, and assign to each of the Half-Breeds a section of land. He also deprecated the attempt to circumscribe the meaning of the expression "Half-Breeds," as suggested by the Commissioner, and appealed "to the writers upon that country, and to the testimony of the oldest and most intelligent of its inhabitants, to prove that the words have been used for more than half a century to designate that class of population which are of Indian extraction."

On the 22d of February, 1839, Messrs. Stambaugh and Bailly, as agents of the Half-Breeds, addressed a long letter to Secretary Poinsett for the purpose of controverting the meaning attached by Commissioner Crawford to the word Half-Breeds, and to urge their own appointment, to carry out the provisions of the ninth and tenth articles of the treaty, in accordance with the unanimous recommendation of those interested. They say, in reference to the number entitled: "We believe there are about one hundred and fifty who were born in 1830. The quantity of land to

be divided may be estimated at four hundred and eighty sections. Thus, there would be about three hundred and thirty sections to be held under the present title."

Secretary Poinsett, on the 28th of the same month, replied that the decision to which they referred was not founded on the technical meaning of the word "Half-Breeds," which he believed "included all those of Indian descent," but "upon the inexpediency of making any division, and vesting the fee of those lands in the claimants. At the same time," "he could not recommend such a measure to the President without some reservations which will prevent the land from falling into the hands of other than those of the claimants, and this cannot be done without legislative interposition." The Secretary added that it was the intention of the Department to postpone all action upon the subject until the next session of Congress; but if Messrs. Stambaugh and Bell desired it, the papers would then be submitted to that body.

On the 1st of March, Colonel Stambaugh replied, at length, to the letter of Secretary Poinsett, and pronounced a protest against a division of the reserve, purporting to be signed by a large number of the "Half-Breeds," which had been filed at the Indian Office in the fall of 1838, "a base fabrication," and entered into a minute detail of facts, to prove the truth of the assertion. Accompanying his communication are letters from Messrs. B. F. Baker, Franklin Steele, and Alexis Bailly, approving the same, as well as a power of attorney, dated the 2d of October, 1838, from many of the half-breeds of the Madawankanton band of Sioux Indians, (some of whom had signed the "protest,") authorizing Colonel Stambaugh and G. W. L. Ewing to act as their agents in securing a division of the land under the provisions of the treaty, in accordance with the memorial previously presented. Colonel Stambaugh intimates, in pretty

plain terms, that Major Taliaferro, the Indian agent, who, he said had a personal interest in having the grant limited to Half-Breeds only, was the author of the protest.

To this communication Secretary Poinsett replied, on the 20th of March, stating that "the objections raised by the Department to the project of a division was in no respect personal to Messrs. Stambaugh and Bailly, who he had no doubt were fairly selected by the parties to represent their interests and effect the division, but arose from its obligation to protect these people from the effect of their own improvidence, which can only be done by legislative provision. The Department," he added, "could not authorize the preliminary measure" of dividing the tract, but would oppose no objection—it being expressly understood that Messrs. Stambaugh and Bailly would not be entitled to any remuneration from the Government for their labor, "unless especially provided for by Congress hereafter."

On the 7th of March, 1840, Commissioner Crawford submitted to the Secretary of War a report on the letter of the Hon. John Bell, chairman of the Committee on Indian Affairs of the House of Representatives, addressed to Secretary Poinsett on the 27th of February, explanatory of the causes which delayed or prevented the execution of that provision of the treaty "of 1830 respecting fee simple grants to Half-Breeds." He contended that, in assigning the reserve for the occupancy of the Half-Breeds in common, the treaty, as he construed it, was fulfilled—"all the rest belonged to executive discretion." The President could grant a fee simple of a section of land to one or more individuals of the tribe, "that he might thing meritorious and worthy, and likely to improve the favor," &c. Of the propriety of granting the prayers of the memorialists for a division of the whole tract, Congress, he contended, are to judge. The following extracts from the report will show the reasons which led Commissioner Crawford to these conclusions:

"The land set apart by the treaty for the Half-Breeds never was granted to the United States. It was a donation by the Indians to their mixed bloods, with the consent of the United States, in whom the fee simple was vested. The grant, therefore, was limited to the Indian right—that is, to hold by occupancy; to this the United States consented, and so far only is there any contract or right, upon which they could insist, vested in the Half-Breeds by the 9th article. The claimants go further, and, in all their applications and communications, speak of a division into sections for their own use, in the memorial of last year, as well as in that now presented to Congress, of an equitable apportionment among them of the surplus to be granted in fee simple as the treaty prescribes."

This is an error. The 10th article contemplates neither in letter nor spirit a general division into sections among them, much less a ratable assignment of what would be left, after such allotments; nor is there any executive power to do either, if either had been thought politic or for Indian interest.

The tenth article authorized the President to grant; that is, he "may hereafter assign to any of said Half-Breeds, to be held by him or them in fee simple, any portion of said tract not exceeding a section of six hundred and forty acres to each individual." The treaty was executed by the assignment of the Indian title, and the occupation by the Half-Breeds of the land in common; all the rest belonged to executive discretion, which was, as I construe the treaty, to be exercised, if at all, in granting the fee simple, or a section of land, to one or more individuals, that he might think meritorious, and worthy of, and likely to improve the favor, but not looking, in any event, to a division, and, if possible, still less to an apportionment of the land that, it is said, will be left, if a section should be given to each mixed-blood.

"It may be proper to grant the prayer of the memorial. Of this, Congress are to judge; for without the authority and sanction of the law, the power, it seems to me, is wanting. Should the legislature so declare its pleasure, it will be the duty of the Department to see it executed."

Secretary Poinsett, in transmitting the above mentioned report to the Hon. John Bell, on the 13th of March, 1840, says: "In this report the Department fully concurs, and is of the opinion that, without some restriction, these lands would, if divided as prayed for, in a short time fall into the hands of speculators. Secretary Poinsett at the same time transmitted copies of all the papers in reference to the matter which were of file in the Department.

On the same day, Colonel Stambaugh addressed a letter to Secretary Poinsett, enclosing a memorial to the President from certain Sioux Half-Breeds, and also a letter from Alexis Bailly, on the subject of the reserve.

On the 12th of March, 1839, Secretary Poinsett caused a "public notice" to be published in certain newspapers in Missouri and Iowa, to the effect that no sale of the undivided interest held in said Half-Breed reserve, "will be recognized or regarded as valid by the President of the United States."

A memorial of about sixty relatives of the Sioux Indians, dated at St. Peters on the 24th of June, 1839, was addressed to the President, urging the policy and expediency of a division, and announcing the appointment of Messrs. Stambaugh and Bailly, and N. Boilvin, to represent their interests. They recommend the passage of a law by Congress authorizing a division of the tract, after supplying individual reservations upon the same principles.

On the 17th of December, 1839, Governor Dodge, of Wisconsin, enclosed to this office a copy of a preamble and resolution of the legislature of the Territory of Wisconsin,

instructing the delegate from the Territory "to use his influence to procure the passage of a law directing the early survey and apportionment in fee simple among the claimants," in order to prevent the suffering and continual and heavy loss arising from the uncertain tenure by which they now hold their reserve. The receipt of that resolution was acknowledged on the 23d of January, 1840.

On the 22d of February, 1840, the Hon. Wm. W. Chapman, of Iowa, enclosed a memorial of the legislative assembly of that Territory, approved the 31st December, 1839, urging the policy of a division of the Lake Pepin reserve, as a measure that would "tend greatly to promote the prosperity and security of that portion of the Territory," &c. Its receipt was acknowledged on the 13th of March, with a copy of the report of the 7th of that month, showing the views of the Department.

On the 30th of March, 1840, Commissioner Crawford, in compliance with the verbal request of the Hon. John Bell, chairman of the Committee on Indian Affairs of the House of Representatives, submitted an estimate for the purchase of the Half-Breed tract. The salary of the Commissioner and Secretary, and the incidental expenses, he estimates at $2,500, and the 384,000 acres of land contained in the reservation, at one dollar per acre. He says the tract, being exactly thirty-two by fifteen miles, would, but for the meanders of the Mississippi river, contain only 307,000; but these meanders, he thinks, will give upwards of 600 sections, or 384,000 acres. He supposes that two hundred may comprise the whole number of half and quarter-bloods, and thinks, as they are in some measure individual owners, that "each of them should sign the compact for the purchase of the reserve."

On the 9th of July, 1840, Colonel Stambaugh addressed a letter to the chairman of the Committee on Indian Af-

fairs of the House of Representatives, calling attention to the memorial of the Half-Breeds of August, 1837, proposing the appointment of commissioners to divide the tract among the claimants of mixed blood, who, he supposed, did not amount to two hundred persons; and proposing, on their behalf, to relinquish the balance of the reserve, "say 256,000 acres, for the sum of $200,000." To show the impolicy of not assenting to his proposition, Colonel Stambaugh referred to the case of the Sacs and Foxes at the Des Moines Rapids, in which those Indians "sold their common interests for a mere trifle, and afterwards finding that the purchasers might procure a change of tenure, they sold the same interest to others, which gave rise to endless litigation."

Governor Doty, in a letter addressed to Secretary Bell and dated on the 30th of June, 1841, urged the policy of purchasing the Half-Breed tract, and states that the reservees are anxious to sell their interest to the United States. He proposes, if so instructed, to treat with them.

In a letter dated in this city, in July, 1841, the Hon. John W. Parker, of the legislature of Iowa, urges upon the Secretary of War the policy of a division of the Lake Pepin reserve in severalty; and, by the way of illustrating the policy of his advice, refers to the case of the Sacs and Foxes at the Des Moines Rapids, which, in consequence of the Indians having sold their interests in the common reserve, "has involved that whole country in litigation, and the Territory in great expense."

On the 30th of July, 1841, Colonel Stambaugh again called the attention of Secretary Bell to the subject, and referred him to a member of the Iowa legislature, and the late delegate from that Territory, both then in this city, for information as to the policy and expediency of the measure of dividing the Half-Breed reserve.

In his annual report of the 10th of September, 1845, speaking of Half-Breed reservations generally, Superintendent Harvey, of St. Louis, expresses the opinion that the interests of the Indians, in all cases, would be advanced by delivering to them patents for their reservations, with authority to dispose of them by sale, "as they would, nine times in ten, make a better sale with a patent than otherwise."

Commissioner Medill, in replying to a letter of the superintendent at St. Louis, said, in September, 1847, that he agreed with his predecessor as to the impolicy of dividing the Half-Breed tract, and allotting particular tracts to the claimants respectively in severalty, to be held in fee simple; but that the suggestion of General Milburn, (whose letter Superintendent Harvey had enclosed,) that "measures be adopted to extinguish the Indian title to the land, would receive due consideration."

In February, 1849, the Hon. H. Sibley enclosed a letter from Dr. D. Dale Owen, geologist, to a Mr. Erisbois, in which Dr. Owen says the Half-Breed tract "is a mineral region," and that "lead will be found there, and probably copper also." Mr. Sibley therefore hoped, in view of its value as such, that the department would favorably consider the proposition which he had made, as attorney for a large majority of the claimants, to sell the tract.

Commissioner Medill gave an unfavorable answer, and informed Mr. Sibley that various propositions for the sale of partition of this reserve had been submitted to the Department, "and that it was determined, in every instance, that the matter should first, in some way, receive the sanction of Congress." The power of attorney, which was considered as defective, was returned with this answer on the 16th of February, 1849.

The eighth article of the treaty of the 5th of August, 1851, between Commissioners Lee and Ramsey and the Dakota Indians, is in the following words:

"Article 8. The Half-Breeds of the Sioux nation having failed and refused to avail themselves of the provisions for their benefit in the ninth and tenth articles of the treaty concluded at Prairie du Chien on the 15th of July, 1830, it is hereby agreed, at their request, that in lieu of the tract of land set apart for the occupancy of said Half-Breeds, there shall be paid to them by the United States, under the direction of the President, the sum of one hundred and fifty thousand dollars, ($150,000:) Provided, that the non-ratification of this article shall in no manner affect the other provisions of the treaty."

This article was, however, stricken out by the Senate, in executive session, on the 22d day of June, 1852, which, as before stated, leaves the matter just as it stood in 1836, when a proposition for a division or purchase of the tract was first made.

Recently there has been received from Governor Gorman, of Minnesota, a petition from ten of the Half-Breeds residing upon the Lake Pepin reserve, dated at Wabashaw, in Wabashaw county, in said Territory, in June last, praying that the President may cause to be conveyed to each of the petitioners, in fee simple, under the superintendence of Governor Gorman, a section of land, in pursuance of the power vested in him by the 10th article of the treaty of 1830.

The petitioners say they have resided twelve years and upwards upon their respective tracts; that emigrants are daily making claims and settling permanently upon the reserve—"a circumstance," they say, "pregnant with much evil, and calculated to embarrass its final adjustment," &c.; and they ask that their respective buildings and improvements may be included in and form a part of their reserves of 640 acres each. The petition is favorably en-

dorsed by Governor Gorman, under date of the 15th of July last, in the following words:

"From the intelligent character of these petitioners, and from the fact that our Territorial law has given them the right of citizenship, voting, &c., I especially recommend that their prayer be granted."

A petition of the Madawakanton Half-Breed Sioux, dated at Wabashaw the 14th of October last, and addressed to Governor Gorman, (lately left in this office,) represents that irresponsible individuals among themselves have made sales of their right of common occupancy to citizens of the United States, the result of which, they say, "will lead, among the present occupants, to endless litigation;" that the present white settlers on their tracts "have made permanent establishments, and bid defiance to your petitioners, and have absorbed some of the most important points;" that they are destroying their best timber, and even laying out a portion of their lands "into town plats, and offering lots for sale, to the prejudice and against the interest of petitioners, and contrary to law." They therefore pray for the removal of every person trespassing upon their lands contrary to the intercourse law.

This petition having been referred by Governor Gorman to D. H. Duttin, Esq., the United States district attorney for the Territory, for his opinion as to the powers of the governor to remove intruders, that officer, in a written opinion dated the 8th of December last, (which accompanies the petition,) quotes numerous authorities to show that the land in the reservation "can only be taken possession of and held by a patent from the Government of the United States, or a continued permission from the Sioux Half-Breeds to occupy the same," and that the United States had the undoubted right, under the act of June 30, 1834, "to employ the military force of the country to drive off all persons found upon the territory in question contrary to law," &c., &c.

The fact has also been brought to my notice, that a petition, very numerously signed by the Half-Breed claimants, was drawn up at Red Wood agency, in November last, and addressed to Governor Gorman, urging application to Congress, on their behalf, for the passage of a law authorizing the issue of land scrip in their favor for 640 acres of land each, in satisfaction of their claims to fee simple grants under the treaty, to portions of the Lake Pepin reserve. The petition has been recently filed.

A more recent petition of some of the Half-Breeds, which you referred here, on the 21st ultimo, with directions for a report of the facts, asks the President (to whom it is addressed) to appoint a commission to ascertain the persons and the number that may be entitled, to enable him "to determine the quantity of land that can be granted to each." While of the opinion that if the maximum quantity of 640 acres be granted to each, it will not absorb all the reserve, the petitioners say they are willing that the President "should patent upon the conditions that they (the claimants) should relinquish all right and title to the surplus."

The Sioux bands who were parties to the treaty of Prairie du Chien of July 15, 1830, have, by the treaties of July 23, and August 5, 1851, relinquished all their claim to the country in which the Half-Breed tract is situate; and in the adjustment of the question there is, in my opinion, no interest to be considered but that which the Half-Breeds obtained by virtue of the ninth article of the treaty of July 15, 1830—that is, a right to "occupy the said tract of country, they holding by the same title and in the same manner that other Indian titles are held. But the President of the United States may hereafter assign to any of the said Half-Breeds, to be held by him or them in fee simple, any portion of said tract not exceeding a section of 640 acres to each individual."

I am informed that many of the Half-Breeds are very competent to manage their own affairs, and that they have good improvements on the reserve. It is said that others are altogether incompetent to take care of property. Some of the thrifty Half-Breeds, it is said, have gone off of the reserve, and bought land and made improvements; being unwilling to do so on the reserve, because they could not have land assigned to them in severalty.

No good can result to the Half-Breeds by the continuance of this occupancy in common. Some legislation will, in my opinion, be necessary before a change can well be made, if for no other purpose than to protect the interests of such portion of these people as are incompetent to manage their own affairs.

The laws of the Territory do not operate over the reserve, and the intercourse act is of but little protection to the residents, who are no doubt subject to all the temptations and adverse influences incident to their peculiar location.

In addition to this, the border white settlers in Minnesota must experience great inconvenience from the state of things now existing on Lake Pepin reserve.

I can find nothing in this office from which I am enabled to come to any satisfactory opinion as to the number of Half-Breeds who would be entitled to land, if the President were to determine to assign it in fee simple.

In 1839, it was the opinion of Messrs. Stambaugh and Bailly that there were about one hundred and fifty persons born in 1830 who would be entitled to the grant in fee, and that the reserve would satisfy their demands for 640 acres, and leave a surplus of 330 sections.

The delegate from the Territory has recently informed me that, in his opinion, the land embraced in the reserve

will not be sufficient to allot for each Half-Breed 640 acres. It is, however, understood that he claims that all the descendants of the Half-Breeds of 1830 are proper subjects to participate in the benefits of this land, under the Executive discretion, as they are to enjoy the right of occupancy while it is held in common.

Whether the Executive discretion be exercised, and the land set apart in severalty, or the proposal to issue scrip in lieu of the land be adopted, some legislative provision to guard the interests of the incompetent will be necessary.

I avail myself of this occasion to say that the lands assigned, by the 10th section of the same treaty, to the Half-Breed Ottoes and others between the two Nemaha rivers, in the Indian country, in view of the expected changes in that country, should, before the same embarrassment and difficulties that surround the Lake Pepin reserve, be adjusted with reference to the settlement and occupancy of the Indian country, before that event occurs.

Very respectfully, your obedient servant,

GEO. W. MANYPENNY,
Commissioner.

HON. R. McCLELLAND,
Secretary of the Interior.

GENERAL LAND OFFICE,
February 23, 1854.

Sir: I have the honor to acknowledge the receipt of your communication of the 20th instant, and, in relation thereto, beg leave to state: that on the first view of the case, I was inclined to consider the Sioux Half-Breeds as a band of that nation whose lands could only be acquired by treaty. Having understood, however, from Hon. Mr. Rice and others, perfectly familiar with the facts, that such is not the case, but that they are American citizens, and for

that reason the Senate properly refused to treat with them, the only mode of removing this reservation is to extinguish their claims under the treaty of 1830, by purchase with money, or in the mode contemplated by the bill which you enclosed. The latter, in my opinion, is preferable, for every reason. No proposition, however, is made for the expenses attending the taking of the census of the persons contemplated by this bill, for preparing or issuing the scrip, or for necessary surveys. These expenses will not be heavy or important; but it would seem expedient to attach another section, providing that they shall be paid out of any money in the treasury not otherwise appropriated.

The regular surveys have been extended almost up to this reservation, and it would be expedient that they should be continued so as to include it. The outer boundaries of the reserve could be run to ascertain its area, and the amount, not exceeding 640 acres in any case, to which each would be entitled under the treaty. There would be no necessity, however, for making fractions on each side of the boundaries of this reserve, as the scrip proposed by the act could be located by legal subdivisions.

By this means the harmony and uniformity of the surveys would not be marred, and the expense would be less than if the reserve were specially surveyed.

The following is respectfully suggested as the draught of the additional section:

"Section 2. And be it further enacted, That all necessary expenses of taking the census of said Half-Breeds, issuing the scrip, and making surveys, not exceeding the usual rate per mile allowed by law for such surveys in that region, shall be paid out of any money in the treasury not otherwise appropriated."

The papers accompanying your letter are herewith returned.

I am, very respectfully, your obedient servant,

JOHN WILSON,
Commissioner.

HON. D. B. WRIGHT,
Of the Committee on Indian Affairs, House of Reps.

APPENDIX D.

No. 639.

CIRCULAR RELATIVE TO THE LOCATION OF HALF-BREED DACOTAH OR SIOUX SCRIP, ISSUED UNDER THE ACT OF CONGRESS, APPROVED JULY 17, 1854. (243.)

General Land Office, March, 21, 1857.

Gentlemen:—The Commissioner of the Indian affairs, by letter of the 25th ultimo, has advised this office that scrip has been prepared for six hundred and forty persons, as Da[illegible]otah or Sioux Half-Breeds or mixed-bloods, under the Act of Congress of July 17th, 1854, above mentioned; that five pieces of scrip will be issued to each person, as follows; two for forty acres each; one for eighty acres, and two for one hundred and sixty acres each, making an aggregate for each one of four hundred and eighty acres, designated thus, for example, in the first case: No. 1 A, forty acres; No. 1 B, forty acres; No. 1 C, eighty acres; No. 1 D, one hundred and sixty acres; No. 1 E, one hundred and sixty acres. Blank forms of these five pieces are sent herewith, for your information, so that you may have a proper idea of the original pieces of scrip when they are presented for location.

This scrip, as declared on its face, is locatable upon the following described classes of land, viz:

Upon the Sioux half-breed reservation, which is situated wholly in the two land districts of Red Wing and Faribault, in Minnesota; that portion of said reserve situated in the former being in Townships 111 to 113, inclusive, Ranges 10 to 15 West; that in the latter being in Townships 108 to 110, Ranges 9 to 15.

1st. The scrip may be located by the half-breeds upon any land within this reserve upon which, at the date of the Act of July 17, 1854, he was an actual bona fide settler.

2d. Upon any land within said reservation which, at the date of said Act, was not so occupied by a half-breed, or any other person who may have gone into said reservation under authority of law.

To constitute a half-breed or mixed blood an actual and bona fide settler within the meaning of the statute, it must be shown by proof satisfactory to you, that he was an occupant by personal inhabitation within said reservation at or before the passage of the Act of July 17, 1854, and in such case he will be entitled to locate his scrip, embracing his improvements, conforming to the legal sub-divisions of the public surveys, unless such location interferes with another bona fide settler, when each will be allowed to take such sub-divisions as will embrace his improvements.

The persons who have "gone into said Territory by authority of law," the land officers at Red Wing and Faribault will understand are only such white persons as, prior to the passage of said Act of July 17, 1854, had entered said reservation under the Indian Inter-course laws—such as licensed traders, authorized missionary teachers, and other persons in the employ of Government in connection with Indian affairs, and who inhabited the lands and made improvements thereon prior to said Act. Improvements of this class of persons are shielded from the scrip; yet you can do no act in the way of giving title to the white claimants of such improvements because the law has conferred no power on the Executive for this purpose.

3d. The said Act authorizes also the location of scrip "upon any other unoccupied lands subject to pre-emption or private sale." Or,

4th. "Upon any other unsurveyed lands, not reserved by Government, upon which they have respectively made improvements."

Where the scrip may be located on unsurveyed lands outside of the reservation on which the half-breed has improvements, and which is not reserved by Government, his application for location should be accompanied by a diagram and description, denoting natural objects and distances, so as to fix, with certainty, the exact locality, wanted, serve as the best notice in our power to settlers, that conflict may be avoided, and enable you, when the public surveys are made, to designate the legal sub-divisions embracing the location.

The land selected in satisfaction of a certificate of scrip must be located in the name of the party in whose favor the scrip is issued, and the location may be made by him or her in person, or by his or her guardian or duly authorized agent. The application should be duly attested in each case by the Register and Receiver, and attached to each should be your certificate to the following effect:

"Land Office at.....

....., 18..

We hereby certify that the within scrip has this..... day of....., been located on th....., containing ..... acres, agreeably to the Act of 17th July, 1854, and by the party duly authorized to make the location.

Attest:.....Register.

.....Receiver."

No receipt is to be issued to the locator, except in unavoidable cases where there may be a small excess in the area of the location over the scrip, and in that case it must be paid for, and the Receiver will issue his receipt, which he will number and account for, as in the case of bounty land warrant excess. But no certificate of purchase is to be issued; the scrip and application, instead of certificates of purchase, being the instruments of title which are to be returned to the General Land Office in this class of business.

The Register, however, in the case of excess payments, will append to the application his official statement, that .....acres of said tract, the excess, has been paid for, per Receiver's receipt No.....

Your proceedings in locating the certificates, and your official returns, are to be kept entirely separate and distinct from other sales and locations. At the close of each month the Register and Receiver will make a separate official return of scrip located, with all the papers on file connected with each location, accompanied by a monthly abstract; Form A, herewith.

You will observe that this scrip is *not assignable*, transfers of the same being held void; consequently, each certificate, as hereinbefore stated, can only be located in the name of the half-breed; and such certificates or scrip are not to be treated as money, but located acre for acre.

No fees or commissions of any kind are allowed by this office for services of the Land Officers in this matter, such being an incident to their general duties, and you are, therefore, hereby interdicted from charging or receiving any compensation for such services. This scrip is, of course, not applicable to any class of Indian trust lands, but only to unreserved, unincumbered public lands.

Very respectfully,

Your obedient servant,

THOS. A. HENDRICKS,

Commissioner.

Register and Receiver at .....

APPENDIX E.

No. 281 B.

RELATIVE TO THE LOCATION OF HALF-BREED DACOTAH OR SIOUX SCRIP, ISSUED UNDER THE ACT OF CONGRESS APPROVED JULY 17, 1854,—U. S. STAT. AT LARGE, VOL. 10, P. 304.

General Land Office, February 22, 1864.

Gentlemen:—Questions frequently arise in regard to the location of Dacotah or Sioux Half-Breed scrip issued some years ago from the office of Indian Affairs.

The issue was as follows;—2 for 40 acres each; 1 for 80 acres; and 2 for 160 acres each; making an aggregate for each one of 480 acres, designated thus, for example, in the first case: No. 1 A, 40 acres; No. 1 B, 40 acres; No. 1 C, 80 acres; No. 1 D, 160 acres; No. 1 E, 160 acres.

This scrip as declared on its face, is locatable upon the following described classes of lands, viz:—

Upon the Sioux half-breed reservation, situated wholly in the St. Peter Land District, in Minnesota; being in townships 108 to 110, Ranges 9 to 15.

APPLICATION OF SCRIP TO SPECIAL LOCALITIES.

1st. The scrip may be located by the half-breed upon any land within this reserve upon which, at the date of the act of July 17, 1854, he was an actual bona fide settler.

2d. Upon any land within said reservation which, at the date of said act, was not so occupied by a half-breed, or any other person who may have gone into said reservation under authority of law.

To constitute a half-breed or mixed blood an actual and bona fide SETTLER within the meaning of the statute, it must be shown, by proof satisfactory to you, that he was

an occupant by personal inhabitation within said reservation at or before the passage of the act of July 17, 1854; and in such case he will be entitled to locate his scrip, embracing his improvements, conforming to the legal subdivisions of the public survey, unless such location interferes with another bona fide settler, when each will be allowed to take such subdivisions as will embrace his improvements.

The persons who have "gone into said Territory by authority of law," are, as the Land Officers at St. Peter will understand, only with such persons as, prior to the passage of said Act of July 17, 1854, had entered said reservation under the Indian intercourse laws, such as licensed traders, authorized missionary teachers, and other persons in the employ of Government in connection with Indian affairs, and who inhabited the lands and made improvements thereon prior to said Act.

APPLICATION OF SCRIP TO GENERAL LOCALITIES.

Besides these special stipulations in the law in regard to locations in the Minensota half-breed reservation, the aforesaid statute enlarges the sphere of location by authorizing the location of the scrip.

3d. "Upon any other unoccupied lands subject to preemption or private sale."

You will understand, however, that no mineral or reserved lands can be taken by this scrip, nor can it be located upon the even numbered, double minimum, reserved sections, nor upon any lands on which there is an actual settlement; but it may be located.—

4th. "Upon any other unsurveyed lands, not reserved by Government, upon which they have respectively made improvements."

Where the half-breed for himself may make actual settlement, his improvements will be notice on the ground to any other settler, and in this respect he will stand on the same basis as a pre-emptor of unsurveyed land, and of course cannot adjust his location until after the return of the township plat to the District Land Office. Hereafter, and within three months, he should repair to such Land Office, file his scrip with his affidavit, designating specifically, in compact legal subdivisions, the tracts embracing his improvements, and should state in his affidavit the character and extent of these improvements, and file testimony of competent witnesses corroborative of his statement.

5th. When not located by the reservee in proper person, the application to locate must be accompanied by the affidavit of the agent that the reservee is living, and that the location is made for the sole use and benefit of said reservee.

The land selected in satisfaction of a certificate of scrip must of course be located in the name of the party in whose favor the scrip is issued, and the location may be made by him or her in person, or by his or her guardian or duly authorized agent. The application should be duly attested in each case by the Register and Receiver, and attached to each should be your certificate to the following effect:

"Land Office at.....
.....1864.

"We hereby certify that the within scrip has this ..... day of.....been located on the.....containing .....acres, agreeably to the act of 17th July, 1854, and by the party duly authorized to make the location.

Attest:

....., Register.
....., Receiver."

No receipt is to be issued to the locator, except in unavoidable cases, where there may be a small excess in the area of the location over the scrip, and in that case it must be paid for, and the receiver will issue his receipt, which he will number and account for, as in the case of bounty-land warrant excess. But no certificate of purchase is to be issued; the scrip and application, instead of certificates of purchase, being the instruments of title which are to be returned to the General Land Office in this class of business.

The Register, however, in the case of excess payments, will append to the application his official statement, that .....acres of said tract (the excess) have been paid for, per Receiver's receipt No. .....

Your proceedings in locating the certificates, and your official returns, are to be kept entirely separate and distinct from other sales and locations. At the close of each month the Register and Receiver will make a separate official return of scrip located, with all the papers on file connected with each location, accompanied by a monthly abstract.

You will observe that this scrip is not assignable, transfers of the same being held void; consequently each certificate, as hereinbefore stated, can only be located in the name of the half-breed; and such certificates or scrip are not to be treated as money but located acre for acre.

No fees or commissions of any kind are allowed by this office for services of the Land Officers in this matter, such being an incident to their general duties; and you are, therefore, hereby interdicted from charging or receiving any compensation for such services. This scrip is, of course, not

applicable to any class of Indian trust lands, but only to unreserved, unencumbered public lands.

Very respectfully,

Your obedient servant,

J. M. EDMUNDS,

Commissioner.

Register and Receiver at..... .....

APPENDIX F.

SIOUX HALF-BREED RESERVE AT LAKE PEPIN.

Not Transferable or Assignable.

No.....

Certificate or Scrip)
Acres,.....)

Issued in accordance with the provisions of the Act of Congress, approved July 17, 1854, entitled "An Act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesota, belonging to the Half-Breeds or mixed bloods of the Dacotah or Sioux nation of Indians, and for other purposes."

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS.

Five Certificates or pieces of Srcip,)
No. .... A. to No. .... E., A. and B)
being each for 40, C. for 80, and D. and)
E. each for 160 acres, issued in satisfac-)
tion of this claim for 480 acres.)

Whereas, it has been duly reported to this office, by the Commissioners appointed by the President as ascertain the number and names of the Half-Breeds and mixed-bloods entitled to share in the benefits of the grant or reservation above particularly mentioned, that..... of about the age of .....years, is one of the said Half-Breeds or mixed-bloods of the said Dacotah or Sioux nation of Indians, specified in the said Act of Congress, and as such is entitled to receive a Certificate or Scrip, pro rata

in exchange for ..... right, title, and interest in and to the said reservation of land lying on the west side of Lake Pepin and the Mississippi River, in the said Territory of Minnesota, which was set apart for the benefit of said Half-Breeds and mixed-bloods by the 9th Article of the Treaty of Prairie du Chien of July 15, 1830;

And whereas, the said report of the said Commissioners has been approved and confirmed by the President of the United States; and the said..... has duly and formally relinquished to the United States all ..... right, title, and interest in and to the said reservation of land, as by ..... instrument of relinquishment sufficiently appears;

Therefore, be it known that this certificate or scrip issued by authority aforesaid, will entitle the said..... ..... to locate, at the proper Land Office, the quantity of ..... acres of land, as a part of four hundred and eighty acres claim, upon any of the lands within the said reservation that were not occupied on the 17th of July, 1854, by actual and bona fide settlers of the said Half-Breeds or mixed-bloods, or such other persons as had at that date, or prior thereto, gone into said Territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by Government, upon which they have respectively made improvements.

This Certificate or Scrip is not by law transferable, and any assignment or conveyance of the same is therefore void.

Given under my hand and seal of the Department, at Washington, this ..... day of .....A. D. eighteen hundred and .....

.....,

Commissioner.

APPENDIX G.

DEPARTMENT OF THE INTERIOR.

WASHINGTON, March 27, 1863.

SIR:

I now return to you the papers submitted with your report of the 20th inst. upon the appeal of S. A. Peugh, attorney, representing the title of Sophia Felix, from your decision of the 15th December, 1862, against the location made by her on the 21st November 1861, of her scrip No. 181 A. and No. 181 C. upon the N. 1-2 and S. E. 1-4 of the S. E. 1-4 of Sec. 9, Tp. 15 N., R. 13 E., Omaha district, Nebraska, and in favor of the pre-emption claim of M. W. Carroll, under a settlement commenced December 29, 1861.

The location of Felix is anterior to the pre-emption settlement and if valid should be patented. It is plain from the decision of this Department of July 30, 1862, and is conceded by your office, that the land was subject to location on the 21st November 1861, but you decide against the location for these reasons:

1st. Felix was not a resident upon the land and had no improvements thereon at or before the date of location.

2nd. That "the location of the scrip, although made in her name, was not made by her in person, nor by her guardian or duly authorized agent for her use and benefit, but by an unauthorized person, and for the use and benefit of a person having no legal interest therein."

The law under which Felix claims, is that of the 17th of July 1854 (Stat., Vol. 10, p. 304), which provided for an exchange of lands with the Sioux half-breeds for the tract lying on the west side of Lake Pepin. Sophia Felix was one of the half-breeds, and received her scrip regularly through the officers of the Indian service;—and the law pro-

vides that such scrip "may be located upon any of the lands within said reservation not now occupied by actual and bona fide settlers of the half-breeds or mixed bloods or such other persons as have gone into said Territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands, not reserved by Government, upon which they have respectively made improvements, etc."

The land located by Felix is not within the reservation —but it had been surveyed, and was subject to pre-emption at the date of location, and was unoccupied by an adverse claimant. I therefore deem the location to be good. The law uses the disjunctive conjunction, in the paragraph quoted, and it is in the cases where unsurveyed lands are claimed by a half-breed that improvements are requisite as an antecedent to the right of location, and I therefore do not regard your first objection to Felix's claim as sanctioned by the law.

As to your second objection, I remark that this kind of scrip is by the law, declared to be not assignable. In this case Sophia Felix has signed the application to locate her own scrip. The signature must be treated by us as genuine, when there is no proof to the contrary; and when she has made no complaint against this use of her scrip. The fact that the scrip was carried to the Land Office and the business transacted by another person, does not affect the validity of her entry of the land.

As the certificate of location issued in her name, and the patent will issue to her, neither the Register's report or the affidavits of third parties can be admitted to establish the interest of any other person in the location.

We could not recognize such interest if an assignment in writing was produced and duly proven to have been executed by, the Half-Breed—whether she

could sell or did sell the land after the location of her scrip we need not inquire, and the validity and effect of any such sale or assignment must be left to the arbitrament of the Courts of Law. The location is valid on its face, and the owner of the scrip, so far as she is represented at all, demands the patent to issue in her name, and my decision is that she is entitled thereto.

The subsequent and interfering claim of Carroll must be rejected. The Secretary of the Interior directs me to advise you of these conclusions of the Department in this case.

I am Sir, Very Respectfully,

Your Obedient Servant,

W. T. OTTO,

Assistant Secretary.

The Commissioner of the General Land Office.

APPENDIX H.

A. S. G. F. M. M.

DEPARTMENT OF THE INTERIOR.

WASHINGTON, June 29, 1876.

SIR:

I have considered the case of James Murphy vs. Josephine M. Jones involving the right to the S. W. 1-4 of Section 6, T. 139, N. R. 44 W., Detroit District, Minnesota, on appeal from your decision of October 18, 1875.

The official plat of the survey of this township was filed in the Local Office March 26, 1872.

June 14, 1871, Joel D. Jones, guardian of Josephine M. Jones, by his attorney, George B. Wright, located certificate No. 42 D, Sioux half-breed scrip on the above described land.

August 12, 1872, James Murphy filed D. S. for said land alleging settlement on the same day.

From the testimony and papers filed in this case, it appears that prior to the location of said scrip on said land, George B. Wright, the attorney of the guardian of Josephine M. Jones, and for and in her behalf plowed about one-half acre of said land, and it is alleged, cultivated the same, but in what manner does not appear.

Murphy alleges that at the time he settled upon said land, there was nothing indicating that there were any improvements upon it, and the testimony presented by him fully corroborates his statements.

Subsequent to Murphy's settlement on the land, he built two houses, dug a well, plowed and cultivated eleven acres thereof and has fenced about thirty acres of the same.

You held that these improvements made in behalf of the scripee upon the land were sufficient to warrant the location of said scrip thereon and awarded it to her.

The Act of July 17, 1854 (10th Stats., p. 304), provides that the owners of this class of scrip may locate it upon unsurveyed lands upon which they have made improvements.

The land in question not having been surveyed at the time this location was made upon it, the question arises what amount of improvements shall be made and of what character shall they consist to authorize the scripee to locate said scrip upon it.

Webster defines the word improvements, when applied to lands to mean, "Valuable additions or meliorations; as buildings, clearings, drains, fences, etc."

Neither the amount, nor the character of the improvements required by this act are specified, but I am of the opinion that they should be such as the true meaning of the word signifies, valuable additions to the land.

The testimony presented in this case does not warrant the conclusion that the work done upon this land was in fact, or was intended to be, of any permanent value to it whatever. It seems rather to have been done for the purpose of appearing to comply with the law without in fact doing so. I am of the opinion, therefore, that the improvements placed upon this land were neither sufficient in amount, nor of such permanent character, as to entitle the scripee to locate said scrip upon it.

January 5th, 1876, Murphy filed an appeal from your decision of Oct. 18, 1875. Thereupon the attorneys of Jones moved to dismiss said appeal for the following reasons:

First—That the appeal was not taken in proper time, and

Second—That the points of exception to your decision were not stated.

By your decision of Feb. 23rd, 1876, you denied said motion and as I think correctly on the grounds and for the reasons therein stated.

Your decision awarding the land in contest to Josephine M. Jones is reversed, and I direct that you cancel her location thereon and that upon Murphy's showing full compliance with the law, he have the patent thereof.

The papers transmitted with your letter "G" of March 3, 1875, are herewith returned.

Very respectfully,

Z. CHANDLER,
Secretary.

To the Commissioner of the
General Land Office.

APPENDIX I.

Allen et al. vs. Merrill et al., 8 L. D. 207.

SYLLABUS.

The Commissioner of the General Land Office has jurisdiction to order a hearing for the purpose of determining the validity of a scrip location, either under a protest against such location, or in the absence of any protest.

Under a hearing ordered for such a purpose the voluntary appearance of other adverse claimants confers upon the Commissioner full jurisdiction to pass upon the validity of the conflicting claims.

The adjustment of a scrip location to the lines of the public survey does not validate a location theretofore invalid; it simply serves to designate by Congressional sub-divisions the land covered by the location.

The Sioux Half-Breed scrip authorized by the act of July 17, 1854, conferred upon the Half-Breed a personal right only, and his right of location thereunder is not subject to transfer.

As the transfer of this scrip is prohibited by statute, the Department will not recognize the right of location in one claiming such right by virtue of two powers of attorney, one to locate said scrip, and the other to sell the land covered by the location.

The right of location upon unsurveyed lands, conferred upon the Half-Breed, is limited by a requirement that he shall make improvements thereon; but improvements made for the immediate benefit of one claiming the right of location under a power of attorney, are not within the intendment of the statute.

* * * * * * * * *

SECRETARY VILAS TO COMMISSIONER STOCKSLAGER, FEBRUARY 18, 1889.

The important question for decision in this case is the validity of the location made with the Sioux half-breed scrip. By the ninth article of the treaty concluded with the Sioux Indians at Prairie Du Chien in 1830 (7 Stat., 328) it is provided that, "The Sioux bands in council having earnestly solicited that they might have permission to bestow upon the half-breeds of their nation," a tract about fifteen by thirty-two miles in size, lying west of Lake Pepin, the United States agree to suffer said half-breeds to occupy said tract of country; they holding by the same title, and in the same manner that other Indian titles are held. By the act of July 17th, 1854 (10th Stats., 304) the President was authorized, "To exchange with the half-breeds or mixed bloods of the Dacotah or Sioux nation of Indians, who are entitled to an interest therein," for the said tract of land; and for that purpose was authorized to cause to be issued "Certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the said grant or reservation pro rata among the claimants which said certificates or scrip may be located upon any of the lands within said reservation not now occupied by actual bona fide settlers of the half-breeds or mixed bloods, or such other persons as have gone into said territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands, not reserved by government, upon which they have respectively made improvements; Provided, that said certificates or scrip shall not embrace more than six hundred and forty, nor less than forty acres each, and provided that the same shall be equally apportioned, as nearly as practicable, among those entitled to an interest in said reservation; And provided further, that no transfer or conveyance of any of said certificates or scrip shall be valid."

Much refinement of argument has been pressed in relation to the construction of this statute, based upon the title which the half-breeds had to the reservation they surrendered; but there appears no necessity to grope for motives on the part of Congress with a view to understand what has been declared, since the language of the provisions is plain. Obviously, Congress intended to make the scrip a purely personal right in the half-breed, and, while no restriction was put upon his power of alienation of the land when it should be located, until that time no other person should have any share or interest in this right, nor should the half-breed transfer to another the privilege which Congress had given to him to locate the land. This limitation was peculiarly appropriate to the right to locate scrip upon unsurveyed land, no right to purchase which was prior to this act extended by the land laws, to any other person, nor any privilege to gain a pre-emptive right ever allowed to any but the actual settler.

To give effect to this policy, the regulations of the Land Office have contained from the beginning instructions looking to the maintenance in him of the half-breed's right. The first circular in 1857 (1st Lester, 627) calling attention to the unassignability of the scrip, only directed the location to be in the name of the Half-Breed, and stated that the scrip could not be treated as money, but located only acre for acre. In 1864, a new circular was issued (2 Lester, 307; 1 C. L. L., 721 1 C. L. O., 142) in which, speaking of location upon unsurveyed lands, it was said:

"Where the half-breed for himself may make actual settlement, his improvements will be notice on the ground to any other settler, and in this respect he will stand on the same basis as a pre-emptor on unsurveyed land, and of course, cannot adjust his location until after the return of the township plat to the District Land Office. Hereafter and within three months, he should repair to such land

office, file his scrip with his affidavit, designating specifically, in compact legal subdivisions, the tracts embracing his improvements, and should state in his affidavit the character and extent of these improvements, and file testimony of competent witnesses corroborative of his statement."

Afterwards in 1872, a special circular (1 C. L. L., 723) upon the subject of location of this scrip on unsurveyed lands was issued in which, after reciting the use which had been made of the scrip to strip the timber from unsurveyed lands by filing the scrip as a preliminary location and afterwards withdrawing it, the following directions to registers and receivers were gven:

1st. "That the application must be accompanied with the affidavit of the Indian, or other evidence that the land contains improvements made by or under the personal supervision or direction of said Indian giving a detailed description of said improvements, and that they are for his personal use and benefit; in other words, you should be satisfied that the Indian has a direct connection with the land and is claiming the same for his personal use. Unless such evidence is filed, you will reject the application.

2d. The filing of the scrip must be considered in the character of a location, and should such filing not be followed within the time prescribed by our circular of February 22, 1864, relating to the location of this scrip, by an adjustment to the offcial plat of survey, you will, immediately thereafter, adjust the same yourselves, as near as may be practicable, from the map and description filed by the party, and forward the same to this office with regular abstract and reference to your action; or, if you are unable to determine the locality of the land in the public surveys, you will report the fact, forwarding therewith all the papers in the case, for our action."

In 1878, a new circular was issued which repeated the provisions of the circulars of 1864 and 1872, above quoted (2 C. L. L., 1355; 5 C. L. O., 126.)

If the regulations so laid down are to govern, there is no question but that your decision should be affirmed. The Indian had nothing to do with these locations. The facts were freely stated by the able counsel who orally argued the questions involved. They are very simple. In every instance, the half-breed sold his scrip many years before this attempted location of it and received from the purchaser the agreed price therefor; but because of the prohibition in the act of Congress against transfers, the transaction took the form of a delivery of the scrip accompanied by two letters of attorney in printed form, duly signed and acknowledged but as to the name of the attorney and sometimes if not always as to all of the particulars of description, left in blank; by one of which letters the attorney was authorized to locate the scrip and do whatever might be necessary for that purpose or to obtain a patent, and by the other of which the attorney was authorized to sell and convey by any proper deed any land which the half-breed might thereafter acquire in the United States. Both letters were declared irrevocable, and contained the usual provisions in such instruments. The manner of use of these letters of attorney has been to file with the scrip in the Land Office the one authorizing the location of it not disclosing the existence of the other.

Nothing therefore, to challenge the bona fides of the transaction then appears on the surface, nor any reason why the Land Office should not recognize it as the fair exercise of the right to do by an attorney what one might lawfully do himself. When the location is made, if validly made, the title vests at once in the person to whom the scrip was issued; and thereupon a conveyance of the land is executed by some person who consents to the use of his

name as attorney, under the authority of the other letter of attorney, the blanks of which are filled accordingly.

Thus the title passes to the party owning the scrip. And thus by circumvention, the thing is done which the statute forbds to be done; and the exercise of the privilege of doing by attorney what one may do himself is made operative to accomplish the doing by attorney of what the half-breed could not do himself. The scrip, with these blank letters of attorney pinned to it, passes into the market and is sold, and transferred by mere delivery, as freely as a Government Bond. The half-breed about whom this protecting limitation was thrown disappears as effectually from consideration as if he were dead until some contestant hunts him up to find a basis for a contention against the scrip. The location is often times not made for many years after the original sale by the half-breed; in this case, the certificate of acknowledgment on each of the several letters of attorney is dated as far back as 1871 or 1872. It may well be thought that in many instances the location has been made after the half-breed's death.

It is a rule of law, so familiar as to require no authority, that when a transaction is contained in various contemporaneous papers or documents, or when partly in parole and partly in documents, its character is not to be judged by reference to one paper alone, but all the documents, besides any parole addition, are to be taken together to ascertain what in fact the agreement was, and it will be judged according to its nature as so ascertained. Applying this rule, the transaction by which the half-breed parts with his scrip would be, if written, substantially like this:—

"In consideration of ..... dollars, to be paid by J. S., I hereby sell and transfer to him the scrip issued to me by the United States (describing it); and to circumvent the statutory prohibition, I have signed two letters of attorney

in blank, the one to locate the scrip, the other to convey the land when the scrip shall be located, and I agree that by whomsoever these letters of attorney may be executed I will hereafter make no claim to the scrip or the land."

Unless the letter of attorney which should accompany such an agreement might be regarded as valid notwithstanding the agreement, they have no validity in such a case as this. They are smply parts of a prohibited transaction, and although such an attorneyship, if an independent and bona fide transaction, would be valid, yet, it does not follow that the letter of attorney is to be respected when found constituting a part of a transaction which cannot be supported in law.

The case of Gilbert vs. Thompson (14 Minn., 544), by no means goes the length of holding such a transaction valid, while there are expressions in it indicating that the Court would have been unwilling to so decide. In that case a letter of attorney given by the half-breed to a particular person to make a deed of land to be located in a particular county, which was fully executed within two months, was upheld, being apparently considered the fair evercise of the right to appoint an attorney to do what the party could do directly. But the court said:

"A power of attorney, so far as intended to operate as a transfer, would be of no avail; the right of the half-breed in the scrip and the land would remain the same; it could not be made irrevocable nor create any interest in the attorney."

And again:

"Whether the power to sell would be upheld in an instrument, upon its face a transfer, the former being only incidental, we do not decide."

Unless an agreement by the half-breed, by which, for a consideration presently paid, the other party was authorized to locate the scrip on any land he saw fit, and, secondly,

the half-breed agreed immediately thereafter to convey the same to the other party, should be respected in the Land Office as no assignment or transfer of the scrip, I am unable to perceive upon what reason a letter of attorney, which is but a part of precisely such a transaction, can be upheld.

It is, however, unnecessary to decide what might be the effect of a location so made upon surveyed lands open to pre-emption or private sale. This case relates to unsurveyed land, and a further limitation is imposed both to mark and to restrict the personal right of the half-breed to take such land; he is required to have made improvements upon it. The theory of counsel for the scrip claimants is that the half-breed may make improvements by an agent. This may be granted; but the difficulty with the case is that the improvements were not made for the half-breed in any sense whatever; they were made for the supposed attorney, at his expense, and with no purpose to admit the half-breed to any interest or benefit in connection with them or with the land.

If such a transaction can be supported, then this half-breed's scrip, issued with such precautionary restrictions of law upon the right to use it, has, by this ingenious invention, become invested with a quality specifically denied to it by Congress, the quality of negotiability whereby the holder of it without regard to his relationship to the original beneficiary is clothed with the power to purchase with it unsurveyed lands of the United States; the value of which privilege, in the presence of the rapid development of the country by the agency of railways and from multiplying population, would be very great. It seems to me too plain for question that the duty of the Executive Department, charged with the supervision of the public lands, was to provide such regulations as would limit and restrict the

use of this scrip wthin the bounds which Congress intended, and that, although the same words were not employed with respect to the Indian which are found in the statutes concerning the settlement of citizens upon the public lands, yet it was intended, keeping in view the difference between Indians and civilized persons, to express the same general idea; and that the case in which the half-breed could locate his scrip upon unsurveyed lands was only when he had in fact made improvements for himself and for his own benefit upon the land. It is not said that he must have a dwelling there, but the requirement of mprovements must have some substantial significance. It is not satisfied by doing something which is a betterment of the land but of too slight a character to mark anything more than a pretext of compliance. Thus ploughing is an improvement of land; but it would be no satisfaction of this statute if a fraction of an acre were to be broken by the plough, although it would be so far improving the land. It is more probable that the legislative mind contemplated such improvements as the half-breed Indian would naturally make upon land of his own, which almost inevitably includes some sort of a dwelling-place. At all events, I do not think that the regulation which requires evidence that the Indian has a direct connection with the land and is claiming the same for his personal use, is open to the least fair criticism, but that it is one calculated to effectuate the purpose of the statute and should be supported.

The absence of any proof that the respective Indians were in any wise concerned in the location of the several pieces of scrip involved in this matter, indeed, the plain proof that none of them had anything to do with it, constituted, therefore, a plain and sufficient reason why the Register and Receiver should have rejected the application to locate the scrip as required to do by the circular, and they violated the instructions in not doing so. For this

reason alone your decision against the validity of the scrip location was correct in my judgment.

It is contended that upon the location being made, under the circumstances stated, the title passed at once out of the United States, as effectually as the title to lands granted to aid a railroad pass upon the filing of the map of definite location, and the decision in Larriviere V. Madegan (1 Dillon, 455) is relied upon. That case simply held that the location of the land with the scrip, under the Act of July 17, 1854, passed the fee of the United States into the person to whom the scrip was issued. Ths doctrine may be accepted. But it hardly needs argument to establish that in order to such an effect, the location must be one authorized by the act of Congress, and this position is not the least antagonistic to the decision cited, for in that case there had been a valid location, the court in the recitation of facts stating that the clamant under the scrip located said scrip "upon the property in dispute fully complying with the instructions of the General Land Office." If a piece of the scrip were stolen and a letter of attorney forged, and thereby a location made, it is plain that on proof of the facts the Commissoner would cancel it and that the scrip should be returned to the half-breed to whom it belonged. In like manner if the scrip be actually in the hands of parties seeking to locate it for their own benefit, contrary to the statute and regulation under it, it is equally in the power of the Commissioner to reject the application and deny the attempt to so misuse the scrip, and secure public land without right thereto.

It is also contended that the adjustment of the scrip after the survey was a location upon surveyed land, and no improvements were necessary. I do not think this can fairly be maintained. The act authorizes the location of the scrip upon unsurveyed lands, by the same words in which it authorizes the location upon surveyed lands, and the rule

laid down in Larriviere vs. Madegan is as applicable to the one case as to the other. The title passed out of the United States to the half-breed when the scrip was rightfully located upon unsurveyed land to the land upon which it was so located. It may be doubtful whether he could be required to change the boundaries of his location because they did not correspond with the government subdivisions of the subsequent survey. But waiving that question, the subsequent adjustment by him or with his consent must be taken as having relation to the time of the location and merely as giving description according to government survey of land which was already his. It is but an adjustment of boundaries in perfection of a location previously made and having relation back to the time of the location; not an original location of the scrip.

I have heard full argument by able counsel of the question involved, and am entitled to presume from the character of the gentlemen employed, as well as from the obvious skill and research exhibited, that every resource of reason and the books has been exhausted to sustain the claim of this location. But continued reflection has begotten a firm conviction that it is the duty of the department, in administering this law, to give effect to these limitations, for the existence of which there was obvious reason, and which were plainly declared in the statute. To do otherwise would be to lend the aid of the department to defeat the law which it is established to administer and enforce. The regulation which was the basis of your decision, and is so sharply criticised as unauthorized, is not an addition to the law. It is but a rule of evidence to show that the law has been in fact observed. Nor can parties justly make claim to hardship by the enforcement of this rule. It has existed since 1872, and must have been known to them; and when they attempted to locate this scrip in disregard of it, they took the risks that it would be enforced

if determined to be invalid. They have nothing to complain of because of the failure of an attempt which they made with such notice of its risks.

I have not considered it necessary to point out the many minor informalities apparent in these locations. For the reasons herein set forth I concur in the judgment of your office that the various scrip locations involved in this case are invalid and that part of the decision appealed from which holds said locations for cancellation is affirmed.

* * * * * * * * *

APPENDIX K.

Allen et al. vs. Merrill et al., (on review) 12 L. D. 138.

SYLLABUS.

Sioux half-breed scrip is intended by the statute as evidence of a purely personal right in the half-breed to locate and receive patent for the number of acres named herein, and cannot be used as a means to secure title to lands except for the sole benefit of the half-breed himself.

A location made by one acting in his own interests, and not for the use and benefit of the half-breed, is in contravention of the statute under which the scrip is issued.

The right to locate this scrip on unsurveyed land can only be exercised where the half-breed has made improvements on such land, and the improvements in such case are a condition precedent to the location, and must be made for the use and benefit of the half-breed.

Circular regulations, not in conflict with the statute under which they are issued, have all the force and effect of law.

SECRETARY NOBLE TO THE COMMISSIONER OF THE GENERAL LAND OFFICE,

JANUARY 28, 1891.

* * * * * * * * *

This brings me to consider the important question to be determined on this review. It relates to the validity of the scrip location and is presented by the several joint contentions of the claimants thereunder.

It is perfectly plain to my mind, as a matter of original construction, that by the Act of Congress the scrip in question was intended to be the evidence of a purely personal

right in the half-breed to locate and receive patent for the number of acres of land therein called for. That this is true is clearly shown by the declaration in the act that no transfer or conveyance of the scrip shall be valid. If the scrip could not be legally transferred or assigned, it must necessarily follow that it could not be used as a means to acquire title to lands by any person other than the half-breed himself, or by his agent or attorney. It was therefore, obviously intended for the sole benefit of the half-breed. It could be lawfully located only by him in his own proper person, or for his sole use and benefit, by his legally constituted agent or attorney. These propositions will scarcely be seriously questioned. They are the result of the clear and unambiguous provisions of the statute. In view thereof, do the locations in question come within the intendment of the law? That they are not made by the half-breeds in person is beyond queston. In my judgment, it is equally clea so far as the present record shows that they were not made by a legally constituted agent or attorney, and for the sole use and benefit of the half-breeds named.

They were all upon unsurveyed lands. In the Huot case the location was made by Winston. The record fails to disclose any authority whatever in him to make the location or to act in any manner in the premises. The alleged letter of attorney authoizing the location was given to W. W. Hale without power of substitution. Hale could not therefore have delegated to another the authority thus delegated to him by the half-breed, even if he had attempted to do so. There does not appear, however, to have been any such attempt. While the only application in the record purports to have been signed by Hale as the attorney for Huot, it bears date long after the location was made, and was evidently nothing more than a mere blank form at the date of the location and remained so until after the lands were surveyed. Hale had nothing to do with the location

He simply appears, at some time or other, to have signed a blank form of application and placed it in the hands of Winston, who made the location, not for the use and benefit of the Half-Breed, but for the sole use and benefit of himself. The record shows that his contract with Hale was that the latter, as attorney for the Half-Breed, should convey the lands to him after the location had been made, and that a conveyance was executed in pursuance of such contract. It thus appears that the Huot scrip was attempted to be used by Winston as a means to acquire title in himself to a portion of the public lands plainly, in my judgment, in contravention of the letter and spirit of the statute.

It is vain to claim that the location was made by him as the attorney for the Half-Breed. In the first place, there is no evidence of any such attorneyship, as has been already shown, and, in the next place, it clearly appears that Winston acted for himself in making the location and not as the attorney for anybody. Action by an attorney as such, necessarily implies the existence of a principal, and that the action is for the principal. Such was not the case here. As a matter of fact the scrip had been sold by the Half-Breed, and coming in the course of time into the hands of Winston, he used it for his own benefit. It was evidently not contemplated that the Half-Breed should have any beneficial interest in the land sought to be acquired by the use of the scrip.

The several locations made by Merrill depend upon substantially the same state of facts, both as to the means used, and the results sought to be obtained. Some differences, however, exist. In the case of Young and Carron the letters of attorney were given with authority for substitution, and it appears that the attorney, Shillock, did substitute one Williams to act in his stead in the premises, but there is nothing to show that Merrill had an authority directly or indirectly from the Half-Breeds to make the locations. In

the case of Joseph Brown, if the letter of attorney be accepted as genuine according to the purport of its face, it follows, necessarily, that Merrill acquired no right by virtue of that power to locate the scrip in question. He could not, under that power, locate any other scrip than that therein described, namely: "No. 516, letter D." If, on the other hand, we go outside the letter of attorney to seek an explanation of the discrepancy between the scrip located aod that therein described, it appears, according to Merrill's own showing that the alleged letter of attorney was, when signed by the Half-Breeds, nothing more than a mere blank form, and therefore carried with it no authority for any purpose. It is difficult to conceive how it can be seriously claimed that this letter of attorney gave Merrill any authority concerning the scrip, "No. 596, letter D", which he attempted to locate thereunder.

It is apparent here, as in the Huot case, that the scrip was located by Merrill not for the benefit of the Half-Breed, but for the sole use and benefit of himself. There was on his part no agency or attorneyship for the Half-Breeds. It was not contemplated that they should acquire by the operation any beneficial interests in the lands. In each case the scrip was used by Merrill as a means to acquire title in himself to the lands in question. It is proper also to note that in the Carron case there was no evidence presented showing the death of the scripee, Napolean Carron, or that Lewis Carron was his sole heir. This location was therefore not made in accordance with the instructions of November 12, 1874, above referred to. So far as this record shows the scripee may be a living person.

It is contended with great earnestness that these locations are valid, notwithstanding the manner in which they were made. In support of the contention several authorities are cited from the courts. They are the cases of Gilbert vs.

Thompson, (14 Minn., 514); Thompson vs. Myrick, (20 Minn., 205); and the latter case in the Supreme Court on appeal (99 U. S., 291). These authorities have been examined. In my judgment they do not go to the extent claimed for them.

In Gilbert vs. Thompson, the case chiefly relied upon, both parties claimed title to the land, which was the subject of controversy, through one Amelia Monette, Sioux Half-Breed. The plaintiff claimed by deed directly from Monette, dated May 29, 1867, and the defendant by deed from one Benjamin Lawrence, as attorney in fact for said Monette, dated July 18, 1857. By the power of attorney under which the latter deed was executed Lawrence was authorized by Monette,

> For me and in my name to enter into and take possession of all the real estate belonging to me, or of which I may hereafter become seized, situated in the County of Wabasha, in the Territory of Minnesota; and for me to lease, bargain, sell, grant and confirm the whole or any part thereof; * * * * * * and for me and in my name to make, acknowledge and deliver unto the purchaser, or purchasers, good and sufficient conveyances.

As against this showing of title in the defendant, the plaintiff offered to prove by parol evidence that the lands were acquired by means of scrip issued to Monette, the Half-Breed, under the act of July 17, 1854, and that the transactions at the date of the power of attorney involved a transfer of the scrip, and were therefore designed to evade and defeat the Act of Congress. The court held that the power of attorney could not be thus contradicted, and declined to admit the testimony; and as between the contending parties, the title in the defendant was upheld. In its opinion the court said:—

> It was the intention of Congress that the right to acquire public lands by means of this scrip,

should be a personal right, in the one to whom the scrip issued, and not property in the sense of being assignable; but no restraint is imposed upon the right of property in the land, after it is acquired by location of the scrip. In the scrip itself, the Half-Breed had nothing which he could transfer to another; but his title to the land, when perfected under it, was as absolute as though acquired in any other way. It follows therefore, that any attempt to transfer the scrip, directly or indirectly, would be of no effect as a transfer. * * * * A power of attorney, so far as it intended to operate as a transfer, would be of no avail, the right of the Half-Breed in the scrip and land would remain the same; it could not be made irrevocable, nor create any interest in the attorney. Should the attorney sell under it, he would be accountable to his principal, precisely as in the case of any power to sell; but a simple power to sell, executed by a Half-Breed is good till revoked, and would extend to lands subsequently acquired by means of scrip, if such lands came within its terms. We think such a power could not be varied by parol proof that the parties had an intention not expressed in it, even to defeat the power, except on the same grounds as would admit such proof in other cases. * * * Whether the power to sell would be upheld in an instrument, upon its face a transfer, the former being only incidental, we do not decide.

The controlling points in the case, as decided by the court, plainly were (1) that a simple power to sell, executed by a Half-Breed, such as the one there considered, would extend to lands subsequently acquired by means of scrip if within its terms, and (2) that parol proof of an intent coincident with the creation of the power to transfer the scrip, could not be received to defeat the power.

These propositions furnish no support, in my judgment, to the contention in behalf of the locations here in ques-

tion. That a power to sell may extend to lands afterwards lawfully acquired by means of scrip is not attempted to be controverted; and no question relative to the admissibility of evidence, such as that considered by the court, *can possibly* arise in this case, for the simple reason that the Government is here a party interested, whereas the controversy in that case was between contending claimants for the land after the Government had parted with its title. While the rule of evidence laid down may properly be enforced in controversies in the courts between individual claimants, it does not follow that such a rule is to be here applied as against the Government whose interest it is, before it parts with its title, to see that the law has been faithfully complied with. It is entirely within the jurisdiction of this Department to inquire into the matters alleged against the present locations no matter by whom or how they are presented; not only for the purpose of passing upon the equities of the case as between contending claimants, but for the purpose of ascertaining whether the requiremerts of law have been fully met. It is with this view primarily, that the present inquiry is made, and I know of no rule of evidence to exclude any testimony relating to the character of the locations. That the court did not pass upon the question here involved is clearly shown by their statement that "we do not decide" whether a power to sell contained in an instrument on its face a transfer, the power being merely incidental to the transfer, would be upheld. That is the question here—the only difference being the manner of its presentation. It properly arises here on the record; in Gilbert vs. Thompson it did not, the evidence of the transfer being excluded on technical grounds and therefore was not decided.

Thompson vs. Myrick goes no further. It does not reach the question in the case at bar. It was in fact ruled on Gil-

bert vs. Thompson by the State Court, and that ruling was affirmed by the Supreme Court on appeal.

The case of Sophia Felix (unreported) is cited from the Department. It was decided in 1863. In that case, however, there was nothing to show that there had been in fact a transfer of the scrip by Felix, the Half-Breed. On the contrary, it appeared that she had signed the application to locate her own scrip, and there being no proof to the contrary, her signature was accepted as genuine, and the location allowed as for her use and benefit. "Whether she could sell or did sell the land after the location of her scrip," said the Department, "we need not inquire, and the validity and effect of any such sale or assignment must be left to the arbitrament of the courts." The case therefore does not go to the extent of holding valid such a transaction as that here considered.

The next question relates to the improvements required on unsurveyed lands. The act provides that the scrip "may be located," among other lands upon any "unsurveyed lands, not reserved by Government, upon which they," (the Half-Breeds) "have respectively made improvements." I think this language clearly makes the improvements a condition precedent to the location. Congress has specifically declared what lands shall be subject to the scrip, thereby excluding all other lands than those defined, from the right of location. If unsurveyed, they must be lands upon which the Half-Breeds have made improvements, or they cannot be located with the scrip. The improvements constitute a part of the description of the lands defined as locatable.

This view is strictly in accord with the uniform construction given the act by the Department, shown by the circulars of instruction from time to time issued thereunder as above referred to. And in the Sophia Felix case, supra, it was expressly stated, speaking of unsurveyed lands, "that

improvements are requisite as an antecedent to the right of location."

But it is in the third place contended in effect, that these circular instructions are in contravention of the provisions of the act, in that they impose upon the scripee conditions not authorized thereby. I do not so regard them. It was clearly within the power of the Land Department, and, indeed, it was its plain duty, to issue such regulations as were deemed necessary, to secure a faithful administration of the law, and to prevent its evasion. It was thus required that when locations were sought to be made upon unsurveyed lands, evidence should be furnished showing that the lands contained improvements made by the Half-Breed, or under his personal direction; in other words showing that the Half-Breed had a direct connection with the land, and was claiming it for his personal use. This requirement is in no sense in contravention of the statute. It adds nothing to it. Unsurveyed lands are not locatable under the act, unless they contain improvements made by the Half-Breed. The regulation simply furnishes a means of showing that in this respect the law has been observed. It goes no further. Not being in conflict with the statute, these regulations have all the force and effect of law. Hessong vs. Burgan (9 L. D., 353), and cases cited.

The evidence thus requred was not furnished when the present locations were made. The facts are that the improvements were not made by the Half-Breeds, or for them in any sense whatever. They had nothing to do with the locations, and there was no purpose that they should have any beneficial interest in the improvements or in the land. It is not denied that improvements may be made by an agent. That was not the case here. They were made by the parties locating the scrip, not for the Half-Breeds, but for their own use and benefit. This it seems to me was in

violation of the letter and spirit of the statute. The further contention is that these locations should be sustained for the alleged reason that they were made in accordance with the then and previously prevailing practice of the Department in like cases, under which it is claimed patents have heretofore uniformly issued. On this point a number of cases, in which patents have gone out, are cited from the files of the Land Department. Two only are claimed to bear directly upon the question of the transfer of the scrip. These cases have been examined. They are not analogous to the case at bar. There is nothing on the face of the record in either of them even tending to show that there had been a sale or transfer of the scrip. One of them (Josette St. Germaine, scrip No. 628, Letter A., R. & R. No. 99 San Francisco, California), was a case in which there was a power of attorney executed by the Half-Breed, authorizing the attorney named, or his substitute, to locate the scrip, and upon such location to sell the land. By letter of substitution, duly executed, the attorney appointed another to act in his stead. Application was made to locate the scrip December 24, 1866, several months after the lands had been surveyed in the field, and the certificate of location bears date Februray 11, 1867, the day on which the plat of the survey was filed in the local office. In the other case (Nancy Rock, Scrip No. 94, Letter C., R. & R. No. 108, Otter Tail, Minnesota), there was also a letter of attorney authorizing the location of the scrip and the sale of the land. The application and certificate of location both bear date December 17, 1860, after the lands had been surveyed and plat filed.

Whatever may have been the real facts of these cases, it is certain that the records do not disclose anything tending to impeach the bona fides of the locations. It was upon the papers filed that the Land Department acted in passing

the locations to patent. These papers showed a simple power given by the Half-Breed to locate his scrip and to sell the land after location. That this could lawfully be done is not questioned. The record failing to show anything to the contrary, the necessary legal presumption was, and is, that the locations were lawfully made. These two cases, therefore, furnish no support to the present contention.

The other cases relate chiefly to the question of improvements on unsurveyed lands. Quite a number have been cited. It is claimed with reference to them that the locations were made on unsurveyed lands and afterwards adjusted to the public surveys and passed to patent without any improvements being shown or required. Most of these cases have been examined. With few exceptions they are found to be cases wherein the application to locate was presented after the lands were surveyed in the field. The certificates of location were issued after the plats of the survey were filed in the local office. The locations were generally made by attorney, but in no case is there anything on the face of the record to show that the transaction may not have been simply the bona fide exercise, by the Half-Breed, of the right to do by attorney what he might lawfully have done himself. It is not necessary to comment upon what appears to have been the practice in those cases. They are not analogous to the cases here. That fact is a sufficient answer to the contention of counsel. But few cases are found of locations made before actual survey in the field, in which improvements were not shown. In those, it may be said, there appears to have been no other defect in the locations, and therefore they differ very materially from the cases now under consideration.

Upon the whole, the cases cited failed to show in my judgment that there has existed that uniform practice which is claimed to have prevailed. I find nothing there-

fore in the former practice to justify the Department in approving the locations in this case. The discussion may properly end here. It follows from what has already been said that there is no error in the decision on review, of which Merrill or Winston can complain.

* * * * * * * *

APPENDIX L.

Hyde et al. vs. Eaton et al. (on Review), 12 L. D., 157.

SYLLABUS.

If the location of Sioux Half-Breed scrip is illegal and invalid, a deed of ratification executed by the beneficiary can not give it validity; nor will such deed preclude the Department from inquiring whether the improvements placed on the land were in fact for the personal use and benefit of the beneficiary. * * *

SECRETARY NOBLE TO THE COMMISSIONER OF THE GENERAL LAND OFFICE, JANUARY 28, 1891.

I have considered the motions filed by the parties in interest asking for a review of departmental decision of February 18, 1889 (undeported), in the case of Thomas W. Hyde and Angus McDonald vs. Frank W. Eaton and Orillie Stram and Fred F. Huntress second contestant, involving Sioux Half-Breed scrip locations of lots 3, 5 and 6, and the se 1-4 of the nw 14, sec. 30, T. 63, N., R. 11 W., under certificate 19 "D." and of lots 1 and 2 and the sw 1-4 of the ne 1-4, and the nw 1-4 of the se 1-4 same section, under certificate 19 "E," in the Duluth, Minnesota land district; also the application of Thomas W. Hyde to file pre-emption declaratory statement for lots 5 and 6, the se 1-4 of the nw 1-4 and the ne 1-4 of the sw 1-4 of said section, and the application of Angus McDonald to file pre-emption declaratory statement for lot 2, the n 1-2 of the se 1-4 and the sw 1-4 of the ne 1-4 of said section 30; and also the application of Huntress to contest both the scrip locations and the claims of Hyde and McDonald.

The facts pertaining to these various claims are sufficiently set forth in the decision complained of, and it is not deemed necessary to recapitulate those facts here.

On the part of the scrip claimants, twenty-one specifications of error are assigned. These specifications, except such as are hereinafter specifically mentioned, present questions which were presented in the motion for review in the case of Allen et al. vs. Merrill et al., and which are in the decision this day rendered therein fully discussed. The conclusion reached there is adopted here, and further discussion of those questions is unnecessary.

The first specification, which is in the following words: "Error in fact holding that Frank W. Eaton filled up the blanks in the power of attorney to locate, inserting his own name as that of attorney in fact for such purpose," is without merit. Eaton states in his testimony (p. 67) that the power of attorney was filled out after it had been acknowledged and after it was received by him, and whether the act of writing in his name as the attorney in fact was performed by him or by some one else is wholly immaterial.

In the eleventh and twelfth specifications it is insisted that the location of this scrip June 16, 1883, after the execution of the power of attorney May 25, 1883, was such an immediate and timely execution of the power as to take this case out of the general reasoning in the case of Allen et al. vs. Merrill et al., and that it was error to assume as a fact applicable to this case "that in every instance the Half-Breed sold the scrip many years before the attempted location of it." Admitting that there was error in the decision complained of in the statement quoted, it is not of sufficient importance to justify a conclusion different from that heretofore reached. The important and controlling facts remain, and the mere fact that the power of attorney was executed a few weeks only prior to the date of the location, in-

stead of years, is not material. There is nothing in the matters set up in these two specifications to justify the granting of this motion.

The sixteenth specification alleges that there was "Error in law in not finding and holding that the deed of ratification and confirmation executed by said scripee precluded any examination into the facts as to whether the improvements on these lands were made for her personal use and benefit." I do not think the position taken by the Department on this phase of the case has been successfully assailed in the arguments advanced in support of this specification. The question is not one between the beneficiary of this scrip and her alleged attorney in fact, but is one between the claimants under the scrip locations on the one side and other claimants and the United States on the other; and as against the United States or claimants in good faith under the public land laws, the deed of ratification can have no effect. The question to be determined is whether the locations in question were made in good faith in accordance with the law and regulations. As was said in the decision complained of: "If the location of the scrip was illegal and invalid, then the deed of ratification could not give it validity—could not vitalize that which had not in it the germ or essence of legal validity." There was no error in said decision on this point.

This disposes of all specifications of error in the motion for review filed in behalf of the claimants under said scrip locations adversely, and the conclusion reached in the original decision in regard to these locations will be adhered to.

* * * * * * * *

STATE OF MINNESOTA,

SUPREME COURT.

GEORGE W. GILBERT and HENRY ASH,
Appellants,

vs.

GEORGE THOMSON,
Respondent.

STATEMENT OF CASE.

This is an appeal from an order from the district court of Wabasha County made at the November term, A. D. 1868, overruling a motion for a new trial.

The original action was in ejectment. The complaint is in the usual form. It avers title in fee and right of possession in the plaintiff to the east half south-east quarter of section 10, town 108, north of range 11 west, in Wabasha County, that the defendant is in and wrongfully and unlawfully withholds the possession and prays judgment, etc.

The answer admits possession and denies all the other allegations of the complaint.

The action was tried at the June term, 1868, before said court and a jury, and resulted in a verdict for defendant.

A "case" was made in which the questions now raised appear.

The errors complained of are all in reference to the admission or exclusion of testimony.

The plaintiff offered and read in evidence a deed in fee of the property in question, from Oliver Monette and Amelia Monette, his wife, to the plaintiffs in due form, etc., dated May 29, 1867, and with it the defendant's admission in court that said Amelia Monette, formerly Amelia McNair, was the grantee of the United States of this property, and that at the date of the deed aforesaid, she was the wife of said Oliver Monette, and rested.

The defendant then offered and read in evidence a power of attorney from Amelia McNair to Benjamin Lawrence bearing date May 27, 1857, which contained full and broad words of authority to take possession of, and to lease, bargain and sell at the discretion of the attorney any and all lands of which she then was, *or thereafter might become seized* in said county and to convey by deed the same, etc.

The defendant then offered in evidence a deed from Amelia McNair by Benjamin Lawrence, attorney, to F. S. Richards of this property, bearing date July 18, 1857, to the admission of which the plaintiff objected, which objection was overruled by the court, and the plaintiff excepted.

This deed being read to the jury the defendant offered and read in evidence a deed of the same lands from said Richards and wife to Rodman Birchard, bearing date Jan. 18, 1859, and the plaintiff then admitting that the defendant was in possession of the premises under a contract of purchase from Birchard, the defendant rested.

Copies of all said deeds and said power of attorney are made a part of the "case." (See Paper Book, pages 8 to 14 inclusive.)

The plaintiffs then called as a witness said Amelia Monette, who testified that she was a half-breed or mixed blood, of the Dacotah or Sioux nation of Indians—that in May, 1857, her name was Amelia McNair—that she then lived in Prairie du Chien, Wisconsin, and that she did not then, and does not now know Benjamin Lawrence, and never had any business with him.

The plaintiffs then sought to prove by her, and also by A. P. Foster, by them called as a witness, in substance that said Amelia Monette was one of the beneficiaries, under the treaty of Prairie du Chien of July 15, 1830; that half-breed scrip was issued to her as such under the act of congress of July 17, 1854, upon that subject; that on the 29th day of May, 1857, the date of said power of attorney she at Prairie du Chien sold, transferred and delivered to said A. P. Foster said scrip for a money consideration then paid her by him therefor; that said power of attorney was executed and delivered to said Foster; that said power and the whole transaction was designed to evade and defeat, and was in violation of the terms and policy of said act of congress of July 17, 1854; that subsequently a part of said scrip was located on the land in question by said Foster, after which the deed to Richards under the power was executed, and to prove further by said Foster that said power of attorney was never delivered to said Lawrence, that said Foster sold the land to Richards, who paid him, Foster, therefor, for his own benefit and not for the benefit of Amelia McNair, to whom he, Foster, in whole or in part never accounted,

that Foster did all the business and that Lawrence had nothing to do in the whole matter except to execute the deed to Richards, as directed by Foster.

To develop these facts, numerous questions were asked these witnesses by the plaintiffs, to which and to the facts so sought to be proven, the defendant objected as irrelevant and immaterial. The court sustained the objection and excluded the testimony. The plaintiff excepted. The jury returned a verdict for the defendant. (See Paper Book, page 5 to page 8, and folios 5 to 15 inclusive.)

POINTS AND AUTHORITIES FOR APPELLANTS.

I.

We respectfully submit the court erred in admitting in evidence the deed from Amelia McNair by Lawrence, attorney to F. S. Richards, and for the following reasons, to-wit:

First—The deed describes no lands. The only description is in the following words and figures:

"All that tract or parcel of land lying and being in Wabasha County, Territory of Minnesota, described as follows, viz.: The east half of southeast quarter of section 10, town 108, range 11."

However well we may guess what these cabalistic letters and figures may mean, we submit they are insufficient intelligently and legally in an instrument of the solemnity of a deed to describe lands, and that for this reason the deed is void for uncertainty.

Second—The instrument as the deed of Amelia McNair was never acknowledged. The acknowledgment reads thus:

"Be it known that on the 18th day of July, A. D. 1857, before the undersigned, personally came Benjamin Lawrence, attorney for Amelia McNair, the *obligator* in the above deed from her to F. S. Richards, to me personally known to be the identical person described in and who executed the said deed and he acknowledged that he executed the same freely and voluntarily for the uses and purposes therein expressed.

"JOHN W. BURNHAM,
"Justice of the Peace."

There is no grantor named in that acknowledgment. "Obligator" does not mean grantor, nor as used does it mean anything. At most, this is the individual acknowledgment of Benjamin Lawrence of "his" deed. "He acknowledged that he executed," etc.—not that Amelia McNair by her said attorney acknowledged nor that the attorney as such attorney acknowledged the deed to be the deed of said Amelia McNair.

II.

We submit that in excluding the testimony offered to prove and which clearly tended to prove that the supposed arrangement between Mr. Foster and Amelia McNair, in reference to her scrip and the power of attorney from her to Lawrence and the deed to Richards of the land in question, were void as not only intended to evade and defeat, but as in direct violation of the act of congress, the court below manifestly erred. We shall not examine each question propounded to the witnesses and the ruling of the court thereon, but direct our attention to the one substantive and important proposition involved in this part of the case, for if we are right in this the court was necessarily in error, and if we are wrong in this it is practically unimportant whether the court was in all the minutia of its holdings in this regard correct or not.

The act of congress of July 17, 1854, which provides for the issuance of this half-breed scrip, and in pursuance of whose provisions the same was issued, contains the following proviso at the conclusion of section 1 of that act, to-wit:

"And provided further, That no transfer or conveyance of any of said certificates or scrip shall be valid."

United States Statutes at large, Vol. 10, page 304.

The characteristics of these mixed bloods, and the object of congress in providing in express terms that all transfers or conveyances of this scrip shall be void, no one can fail to understand or appreciate. Those objects and reasons are of such a nature as to furnish neither counsel nor courts with any excuse or apology for narrowing by construction the scope of that inhibition. We well understand that thirst for speculation and greed for gain have prompted to some, perhaps to a great extent, either an open contempt for that law or a more wily and circuitous effort to evade and defeat its wholesome and necessary provisions, but we insist that every principle of law and of legal and judicial morality, and of public policy, demands of the court, with a power proportionate to the frequency and boldness of these efforts, to declare them void.

If all transfers and conveyances of this scrip are void, all efforts by indirection to work transfers and conveyances, and especially with the well defined object and purpose of securing such transfers and conveyances by such indirect means, will and must result alike fatally. This was precisely what we proposed to prove and what the court held to be irrelevant and immaterial.

We are not aware of any case that has arisen under this act, except the case of Cronin and others vs. Dugan and Wife in the circuit court of the United States for

Minnesota, decided at the June term, A. D. 1867, by a full court, Judge Miller presiding. Of course, the case is not reported. Messrs. Bigelow & Clark of St. Paul and S. L. Campbell of Wabasha (the latter being counsel for defendant in this action), were attorneys for plaintiffs and Wilder & Williston and Smith & Gilman were attorneys for defendants. The defendants claimed title under a half-breed scrip entry and a deed from the half-breed under a power of attorney. That power of attorney was in the words and figures following, to-wit:

"Know all men by these presents, That I, Scott Campbell, of the County of Brown and State of Minnesota, have nominated, constituted and appointed, and by these presents do nominate, constitute and appoint Madison Sweetser of Fort Wayne, Indiana, my true and lawful attorney, for me and in my name and stead to bargain, sell, alien and convey any and all tracts of land which I may now own or hereafter acquire, whereever situated, by virtue of the location of half-breed Sioux scrips issued to me in accordance with an act of congress approved July 17, A. D. 1854, entitled an act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesota belonging to the half-breeds or mixed bloods of the Dakotah or Sioux nation of Indians and for other purposes. All of said land so acquired to be sold for such price or sum of money as he may see fit and upon such terms and conditions as in his judgment may seem proper; and by deed or by title bonds or other assurances of title to make, execute and deliver for me and in my name as may be necessary or proper covenants of title and warranty against all incumbrances of whatever kind or nature, and of the proceeds of said sales to reserve and pay himself the sum of five thousand dollars, which I acknowledge to be justly due and owing from me, party of the first part to said Madison Sweetser, party of the second, and the power of attorney is hereby declared to be a power coupled with an interest and wholly irre-

vocable by me until the said indebtedness and interest is fully paid and satisfied. And I further covenant and agree to and with the said Madison Sweetser, that I will not sell, alien, convey, lease, mortgage or encumber in any manner any of said land located by said half-breed Sioux scrip as aforesaid, until said debt and interest is fully paid and satisfied; hereby ratifying and confirming whatever my said attorney may lawfully do in the premises by virtue of these presents.

"The scrip hereinbefore mentioned may be more fully described by piece, containing forty (40) acres letter A number four hundred and nineteen (419). One piece forty (40) acres letter B numbered four hundred and nineteen (419). One piece eighty (80) acres letter C numbered four hundred and nineteen (419). One piece one hundred and sixty (160) acres letter D numbered four hundred and nineteen (419), and one piece one hundred and sixty (160) acres letter E numbered four hundred and nineteen (419), making in all four hundred and eighty acres.

"In witness whereof I have hereunto set my hand and seal this sixteenth day of November, eighteen hundrd and fifty-eight.

"SCOTT CAMPBELL. (Seal.)"

It was in all respects properly executed.

The deed from the half-breed under the power of attorney was in all respects in due form and duly executed June 15, 1863.

The court held the power of attorney and the deed thereunder to be upon their face void, as in violation of and against the policy of the act of congress aforesaid, and excluded them from the jury for that reason. Though adverse to us we thought then, and still think, the ruling correct, and we see no reason why that decision is not in its length and breadth an authority here. True, we do not claim that the power of attorney in this case shows sufficient upon its face as in that, to render it void, but we proposed to prove by both parties to the transaction, that is, Amelia McNair and A. P.

Foster, the facts to show the object and intent of the parties, which Judge Miller held in the other case, sufficiently appeared in the power itself.

St. Peter Co. vs. Bunke, 5 Minn. Rep., page 192.
Evans vs. Folsom, 5 Minn. Rep., page 422.
Ferguson vs. Kumler, 11 Minn. Rep., page 104.
Bruggerman vs. Hoerr, 7 Minn. Rep., page 337.
First Parsons on Contracts, Second Edition, page 381 and 2 and cases cited.
First Kent's Com., page 468 margin.
Second Kent's Com., page 467 margin, in note.
Fourteenth Mass. Rep., page 322.
Fifth Johnson's Rep., page 327.
Fourth Pet. U. S. Rep., page 410.

III.

The parties are not *in pari delicto,* nor is their relative position such that the courts will leave them and the lands in question as it finds them, for

First—These half-breeds were, and were recognized as, the *wards* of the government, by reason of their personal condition and qualities, and hence, the provision in the act of congress quoted above.

Second—This scrip was and long before the sale to Foster had been the property of Amelia McNair. That sale and all instrumentalities designed to consummate and perfect it were void. It would be a monstrous legal absurdity to say, that as a result of this, and of the application of the act of congress, she lost or forfeited either the scrip or the land subsequently located therewith. It was *her* scrip that was located upon this land. It was located in her name. She became and was under that location the grantee of the government. The

patent issued to her. Though the sale and transfer of the scrip and the power of attorney and the deed thereunder were void, she never lost either the scrip or the land, but the land became and was hers, both at law and in equity, by the location of the scrip and the recognition of that location by the United States, in the issuance to her of the patent. Her subsequent sale and conveyance of the premises in question to the plaintiffs in this action vested in them a perfect title to the property.

WILDER & WILLISTON, and
J. N. MURDOCK,
Attorneys for Appellants.

Red Wing, July 20, 1869.

STATE OF MINNESOTA

Supreme Court.

GEORGE W. GILBERT and
HENRY ASH,
Appellants,

vs.

GEORGE THOMSON,
Respondent.

Points and Authorities of Respondent.

MITCHELL & TALE,
Attorneys for Respondent.

H. H. SIVER PRINTING COMPANY, ST. PAUL.

STATE OF MINNESOTA,

SUPREME COURT.

GEORGE W. GILBERT and HENRY ASH,
Appellants,

against

GEORGE THOMPSON,
Respondent.

POINTS AND AUTHORITIES FOR RESPONDENT.

This was an action brought by appellants to recover possession from respondent of eighty acres of land in Wabasha County.

The respondent denied their title and claimed title in himself.

The jury under direction of the court found a verdict for respondent. The appellants waiving their right to a second trial under the statute, make a motion for a new trial upon a case made.

The motion was denied. From this order they appeal.

The facts of the case are as follows:

Both parties claim title under Amelia Monette (formerly Amelia McNair), the original grantee of the United States, and a half-breed of the Dakota or Sioux

nation of Indians. The appellants claim under a deed from said Amelia McNair, or Monette, dated May 29, 1867. Having produced this deed in evidence, they rested their case.

The respondent, to prove his title, produced in evidence—

First—A power of attorney from said Amelia McNair to one Benjamin Lawrence, dated May 27, 1857, and recorded July 6, 1857. (See Schedule B.)

Second—A deed from Amelia McNair by said Lawrence, her attorney, to one F. S. Richards, dated July 18, 1857.

Third—A deed from said Richards to one Rodman Burchard, dated July 18, 1859.

Fourth—An admission by plaintiffs that the defendant is in possession of the land in question, under a contract of purchase from Rodman Burchard (folio 4).

The defendant having thus made out a perfect record title, rested.

The appellants then proposed to avoid the record title of respondent by offering to show that the said Amelia McNair sold to one A. P. Foster certain scrip issued to her under the act of congress, entitled "An act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesota belonging to the half-breeds or mixed bloods of the Dakota or Sioux nation of Indians, and for other purposes," passed July 17, 1854. That a part of said scrip was afterwards located by said Foster upon the land in question.

That the power of attorney to Lawrence was executed and delivered to Foster for the purpose of evading the said act of congress, and therefore void, and that therefore no title ever passed to respondent's grantees.

Although various offers were made, yet all may be summed up in an offer to prove that the power of attorney was executed with the intention of evading the act of congress, which declares all transfers of scrip void.

This evidence the court excluded. To which ruling appellants excepted.

Although other minor points are made, yet the above is the main, if not the only point in the case.

Did the court err in excluding this testimony? Could the title of respondent be attacked and voided in the manner proposed?

It is a question of importance not only because of its bearing on this particular case, but also because its decision is practically decisive of the title by which the inhabitants of a large part of at least two populous counties of the state hold their homes and their firesides.

It is a matter of public notoriety that a class of unprincipled and unscrupulous sharks and speculators have procured for a nominal consideration, from ignorant and degraded "half-breeds," deeds of conveyance covering a great part of the best and most highly cultivated portions of Wabasha and Goodhue counties, and are now only awaiting some encouragement from our courts to institute a flood of ejectment suits that will bring ruin and disaster to many an innocent home.

And while we understand the rules of professional propriety too well to attempt to appeal to any supposed prejudice, yet we apprehend that we are not violating any rule of propriety in thus referring to the interests at stake in the decision of this case, and asking the most careful consideration on part of the court to the issues involved. For while mere sympathy will not and

ought not to control or even influence the decision of any court, yet considerations of public policy always have and ever ought to have their appropriate influence in the decision of cases of this character.

It is only when shut up by the most inexorable and unbending rules of law, that a court would feel bound to render a decision that would practically result in a great public wrong, and open wide the flood gates of injustice and oppression. But fortunately, we are not driven to any such strait. In this case the highest justice, and the clearest and plainest principles of law fully harmonize. The court below was clearly right in excluding the evidence in question.

The provision of law upon which appellants wholly rely is that contained in the act of July 17, 1854, which after providing for the issuing of scrip to the Sioux half-breeds, enacts that "no transfer or conveyance of any of said certificates or scrip shall be valid." (U. S. Statutes, Vol. 10, page 304.)

There is no limitation or restriction whatever, imposed upon the alienation of the land entered with such scrip. There is not even anything forbidding a contract for the sale of such land before it is entered. See same act. Had it been the intention of Congress to impose any such restriction, it would have been so expressed in the act itself, as in the case of the "Preemption Act" of 1841, or the act of July 5th, 1838. U. S. S. Vol. 5, page 260, sec. 29, and act of August 4th, 1842, U. S. S. Vol. 5, page 503.

All such acts imposing any restrictions upon the alienation of property are to be construed strictly and not extended beyond the express and apparent intention of the act itself. It is inconsistent with the nature

of property to restrict the right of alienation on the part of the owner.

Although the question as to whether the title to a portion of the public lands has passed from the United States, must depend exclusively upon the laws of the United States, and although Congress has the full power to dictate how and in what manner the title shall pass from the United States, yet when the title has once passed, the land becomes subject to state laws and by them alone must the mode and manner of alienation be controlled.

Wilcox vs. Jackson, 13th Peters 498;
Carroll vs. Safford, 3d How U. S. 441;
Camp vs. Smith, 2d Minn. 155.

The fair construction of the object and effect of this provision of the act of July 14th, 1854, is simply to provide how the title to the land entered shall be obtained from the United States. It simply provides that the scrip must be entered in the name of the half-breed, and that no assignment of the scrip will be recognized by the United States land offices, but leaving the whole question of title to the land, or the mode of alienating it, to be governed by the laws of the state where it is situated.

Camp vs. Smith, 2d Minn. 155.

With these rules to aid us in the proper interpretation of the statute in question, we now turn to the position taken by appellants.

Because the act of Congress declares that no transfer of scrip shall be valid, they assume that the whole transaction between Foster and Amelia McNair and the power of attorney to Lawrence are wholly void. They assume to repudiate the whole transaction as illegal and

void, and yet they, in the very next breath, ratify and recognize part of the transaction by claiming as theirs the land which Foster purchased with this scrip.

In other words they repudiate the whole transaction for the purpose of defeating our title, and then recognize and ratify a part of the same transaction for the purpose of making out title in themselves.

In order to defeat our title they are compelled to assume that every act in any way connected with the transaction is void. This includes the location of the scrip, the power of attorney and the conveyance by Lawrence, as well as the sale and transfer of the scrip. And yet the only claim of title which they make depends upon and recognizes the validity of some of these very acts. They cannot thus repudiate certain parts and ratify other parts, if all these acts are to be considered one indivisible transaction. In such a case the whole must stand a fall together. But if, on the other hand, these acts are to be held separate and severable. so as to avoid the sale of the scrip, but yet sustain the location and entry of the land by Foster, this theory would in like manner sustain the validity of the power of attorney and the deed made under it by Lawrence.

Again the theory of the appellants is that no legal sale or transfer of the scrip was ever made. *That the scrip is to this day as much the property of Amelia McNair as it ever was.* That Foster or his assignees never acquired any right whatever to it. And yet in claiming title to this land, they not only admit, but necessarily assume that they no longer own the scrip, but have acquired some land in place of it.

So absurd are the conclusions to which the illogical premises of the appellants necessarily lead them. At every step in the case they take one position in order

to defeat our title, and then assume a directly opposite one to establish their own.

Suppose Amelia McNair did sell the scrip to Foster. Such an act was no doubt invalid.

Suppose she has a remedy. It must rest necessarily, on the assumption that the attempted sale being invalid, the title to the scrip is still in her and her property. And therefore her remedy (if any) would be to take steps to recover, *not certain real estate, but the specific scrip.*

And we undertake to say that such an action is the only one that either Amelia McNair or heirs can ever maintain by any process of reasoning bearing even the semblance of consistency.

For these reasons, if no others existed, the evidence offered was clearly incompetent and irrelevant, and properly excluded by the court below.

But again, if the transaction between Foster and the half-breed was illegal, as being against statute, the parties were in *"pari delicto."* It was as unlawful for her to sell as for him to buy. And the contract was fully executed. In such a case the parties being in *"pari delicto"* and the contract being *executed,* the law will not interfere, but leave them as it finds them. Nor will the court in such a case allow the party to recover by taking advantage of his own wrong. *"Ex turpi causa non oritur actio."* And this applies to privies as well as to the original parties.

And for this reason, also, the court properly excluded the evidence.

2d Parsons on Contracts, pages 746 and 747;

2d Parsons on Contracts, page 782;

Foote & Stone vs. Emerson, 10th Vt. 338;

Fackler vs. Ford, 24th How. U. S. 322;
Fivaz vs. Nichols, 52d E. C. L. 501;
Phalen vs. Clark, 19th Conn. 420.

In this case there is *no allegation nor offer to prove that the respondent was either a party to the alleged illegal and void contract, nor that he had any notice or knowledge whatever thereof.* He stands in this case, as in fact, an innocent purchaser for valuable consideration. In such a case Amelia McNair as well as her grantees cannot set up or prove such alleged illegal or void contract as against an innocent purchaser.

Fennell vs. Ridler, 5th B. & C. 406;
Bloxome vs. Williams, 3d B. & C. 232.

Again Amelia McNair having stood by for over ten years and suffered respondent to purchase the land, improve it and expend money on it, acquiescing in the sale made for her and in her name by Lawrence, must now be presumed to have ratified the acts of h[illegible]ttorney, and is now estopped from asserting title to the prejudice of an innocent purchaser.

Wendall vs. Van Ransalaer, 1st John Ch. 344;
Stoirs vs. Barker, 6th John Ch. 166;
Higinbotham vs. Bennett, 5th John Ch. 184;
Town vs. Needham, 3d, Paige 546.

This estoppel applies to privies in estate in blood and in law. Authorities Passim.

Finally, even if all that appellants offered to prove were true and admitted, it could not and would not in any way affect or avoid the power of attorney to Lawrence, or the deed executed under it. It would prove an illegal act in the sale of the scrip, we admit.

But the power of attorney to sell land and the deed made by virtue of it, however they may have been connected in the minds of the party with the sale of the scrip, were in fact independent acts wholly disconnected with the sale of the scrip, and in the eye of the law unconnected with the illegal act and founded upon a distinct and collateral consideration, and therefore not affected by any unlawful acts of the parties in buying or selling the scrip. The consideration in case of the sale of the scrip would move from Foster to Amelia McNair. In the sale of the land the consideration moved from the purchaser to Amelia McNair, through her attorney, Lawrence. The alleged illegal contract of sale of scrip was between Foster and McNair. The contract of purchase and sale of the land was between McNair, through her attorney, and F. S. Richards. *A different contract between different parties, made at a different time, and for a different consideration.* Suppose that under this power of attorney, Lawrence had bargained and sold some other real estate belonging to said McNair, wholly disconnected with this scrip transaction. Would it be claimed that such conveyance would be void? Most certainly not.

This shows that the power and the deed have a force and effect wholly independent of the legality or illegality of the scrip sale and that it is founded upon a distinct consideration. The respondent in making out his title, requires and asks no aid from the invalid sale of scrip. He relies solely on the power of attorney and acts done under it; deeds which are in contravention of no law written or unwritten.

We therefore submit that none of the offers of the appellant go to the validity of the power of attorney,

and therefore the evidence offered was irrelevant and immaterial.

Phalen vs. Clark, 19th Conn. 431;
Story on Contracts, secs. 621 and 622.

So much for this part of the case. We submit that any one of the positions we have taken above is sufficient to exclude the evidence offered.

The counsel refers to a case said to be decided in the U. S. Circuit Court at St. Paul. (Cronin et al vs. Dugan and wife.) This case not being reported, we know nothing about it, except from hearsay. We understand, however, that in the case referred to, the instrument *upon which the party relied for title and which he offered in evidence,* showed upon its face that it was a sale of scrip. The difference between such a case and the one at bar is too evident to require a statement. Moreover, we also understand that it was a ruling made by Judge Miller, on the trial of the case at circuit, upon objection raised by the counsel to the admissibility of the evidence, and hence was made without examination or reflection except such as could be given at the moment. Such a ruling at Nisi Prius ought hardly to be considered authority in any court. Nor do we understand that either court or counsel considered it as either final or decisive of the point.

The only other points in the case are the exceptions taken by appellants to the admissibility of the deed from Amelia McNair to F. S. Richards, none of which are, in our opinion, worthy of any extended answer. The first exception is that the description is void for uncertainty, because it uses certain abbreviations. We are confident that the supposed objection here taken by counsel, is founded upon an error in the printed

case. No such point was made in the court below, and we are confident that the record will not be found to contain the abbreviated description to which counsel excepts.

But we submit that the description as contained in the printed case is good. These abbreviations have a fixed and well defined meaning attached to them. They are abbreviations in common use in the United States land offices, in certificates of entry and other evidences of title to land.

The second objection taken, is to the form of the certificate of acknowledgment. This certificate, we submit, is not only sufficient, but also in approved form. This however is immaterial.

It is not essential to the validity of the deed that it be acknowledged at all. The deed is executed in proper form, and this is all that is necessary to its validity.

Myrick vs. Millan, 13 Wis. 198.

The judgment of the court below ought therefore to be affirmed.

July 23, 1869.

MITCHELL & YALE,
Attorneys for Respondent.

SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, A. D. 1901.

NO. 80.

THE MIDWAY COMPANY,
Plaintiff in Error,

vs.

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN AND MARGARETHA LONSTORF.
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR FRANK W. EATON and MARGARETHA LONSTORF.

ARGUMENT.

I.

Counsel for the respective defendants, in the preparation of their briefs have endeavored, in so far as it was practicable, to avoid unnecessary repe-

tition and save the court as much work as possible, and for that reason have joined in a statement of the facts and an outline of the positions of the respective parties to the suit, which will be found in the brief of Mr. J. L. Washburn.

It has also been arranged between counsel for the respective defendants that certain points in the case should be argued more at length in one or the other of the briefs and barely touched upon in the other. By this method, counsel, who represent different defendants, have been permitted to present the case to the court from their own peculiar standpoint, while at the same time we are satisfied that the two briefs are but little greater in length than a single brief would have been which combined the views of both counsel.

This action is in effect a judicial review of Secretary Vilas' decision in the case of Hyde vs Eaton, and as that decision turned upon the construction of the Act of 1854, a thorough understanding of the nature and purpose of that act is necessary in order properly to consider and rightly determine this case.

NATURE AND PURPOSE OF ACT OF 1854.

The Secretary assumes that congress, in passing the Act of 1854, had the same general idea in view as in the passage of the pre-emption and homestead acts; for in his decisions in these scrip cases, he has applied the same rules of construction that

obtain in the administration of the public land laws. In the case of Allen vs. Merrill, 8 L. D., on page 219, he says:

> "And although the same words were not employed with respect to the Indians which are found in the statutes concerning the settlement of citizens upon the public lands, yet it was intended, keeping in view the difference between Indians and civilized persons, *to express the same general idea.*" (Italics our own.)

Herein lies the fundamental error of the Secretary's position.

There is no analogy, whatever, between the purposes of the Act of 1854 and the pre-emption and homestead acts.

The sole purpose congress had in view in passing this act was to permit the government to obtain possession of the land occupied by these half-breeds, and throw it open to public settlement.

The Supreme Court of Minnesota, in the case of Monette vs. Cratt, on page 184, Gilfillan edition, referring to this act, says:

> "The main object of the Act of July 17th, 1854, appears to have been to get rid of the Indian or half-breed title to the reservation on the west side of Lake Pepin and to bring the same into market."

The opinion of this court on this question is entitled to much greater weight than the opinion of

a Secretary rendered in 1889; because the opinion of the court was rendered only a few years after the passage of the act, and every member of the court lived within a few miles of these half-breeds, and presumably they had personal knowledge of all the facts and circumstances which induced congress to pass the Act of 1854.

This reservation was located in the richest and most populous part of the then Territory of Minnesota. It was in the direct line of western immigration which was then setting in strongly to the new northwest, and the continuance of this reservation would have operated as a barrier to this tide of immigration and would have seriously interfered with the settlement, progress and development of the new State of Minnesota about to be formed. The removal of this barrier was the main purpose that congress had in view; it was this that chiefly occupied its attention,—this was the controlling consideration.

There is absolutely nothing in the act to indicate that congress intended that the half-breed should settle upon and make a home of the lands which were to be given him in lieu of his interest in the reservation.

Congress, with rare wisdom, foresaw that this reservation was a standing menace to the future development of the growing northwest, and that it must be removed. But it could not disregard the rights of these half-breeds for they held their interest in this reservation by the solemn covenants of a treaty with the United States. Congress therefore

said to these half-breeds: "We want these lands; surrender them to the general government and we will give you an equal amount of land, acre for acre in severalty, out of any part of the public domain open to public settlement."

The act is nothing more or less, then, than a contract for the *exchange* of lands between the government and the half-breeds. In fact the transaction is described as an "exchange" of lands in the very first sentence of the act itself. It being a mere exchange of lands, acre for acre, the government was in no position, and had no moral right, to impose conditions upon the acquirement of the lands which the half-breeds were to receive in exchange for the lands they surrendered, nor did it attempt to do so. They held this reservation by a title which congress itself could not dispossess them without their consent. They were giving to the government as much as they were receiving in return. The duties and obligations between these two contracting parties were, therefore, reciprocal; and as the half-breeds conveyed their lands to the government without reservation or restriction they were entitled to receive their lands free from burdens and limitations.

The purposes of the homestead and pre-emption acts, however, are known of all men, and are plainly disclosed by the acts themselves. They were intended to encourage the settlement and cultivation of the country's vast but vacant public domain and to secure bona fide settlers upon the public lands.

Congress well knew that this would result in great benefit not only to the citizens of the country but to the country itself.

Probably the controlling consideration, both in the passage and administration of these laws, was the keen appreciation and recognition of that fundamental principle of Anglo-Saxon civilization, that a nation of home-owners, rather than landless tenants, is the surest guaranty of a country's permanence and prosperity. These laws, therefore, wisely provided comparatively long periods of residence as a condition precedent to the right to obtain these gifts of land from the government. In addition to residence, they also required improvements and cultivation; and, in order to insure compliance with these conditions, it was provided that these settlers should not convey, or make any agreement to convey, their lands until the land officials were satisfied that the law had in all these respects been fully complied with.

None of these reasons exist in the case of these half-breeds, and none of these conditions are to be found in the Act of 1854.

There is not a word in the act from beginning to end requiring the half-breed to occupy, cultivate or improve where his scrip was located on surveyed land; and the only reason for requiring improvements on unsurveyed land was to give notice of prior claims to intending settlers, and not as a condition precedent, in the sense of a personal act of service, that must be performed by the half-breed before he was entitled to receive the land.

Again, the Act of 1854, differs from the homestead and pre-emption laws in this respect: The right to take land under these laws was in the nature of a gratuity, and, aside from the purpose which congress had in view of securing permanent settlers upon these lands and their improvement and cultivation, congress had a perfect right to impose whatever conditions it saw fit upon the gift which it bestowed.

In dealing with these half-breeds the government was not bestowing a gift, but effecting an exchange of lands, and, as a matter of fact, the government received as much as it gave.

Furthermore, there is absolutely nothing in the act to indicate that congress intended that the half-breeds should take and retain these lands as homes. Although they were "mixed bloods," as described in the act, and not Indians, and although as a whole they were doubtless much more intelligent and civilized than Indians, still they had, to a certain extent, the nomadic instincts and roving disposition of their race; and, in the absence of language expressing such intent, it is hardly to be presumed that congress intended that these half-breeds should settle on individual tracts of land as white men would. This position is further borne out by the fact that at the time the act was passed these half-breeds had not severed their tribal relations with the Sioux nation of Indians, and did not do so until 1887, as we are informed by the Supreme Court of the United States in the case of Felix vs Patrick, 145 U. S., 319.

Another thing that strongly leads to the conclusion that congress never expected the half-breed to take these lands for his own personal use, is the fact that the act itself provides that the scrip might be located anywhere on the public domain, from Maine to California and from Florida to Minnesota. As congress deliberately incorporated this provision in the act permitting the scrip to be located anywhere in the United States, it is only reasonable to suppose that it expected this privilege would be exercised to a greater or less extent; otherwise the privilege was useless. If the government had intended or expected that the location of this scrip would be confined to Minnesota, or to Minnesota and the bordering states, the act would have so provided.

In fact, the government entered into an agreement with the Chippewa Indians, in September, 1854, only three months after the Sioux half-breed act was passed, and one of the provisions of this agreement permitted the Chippewa half-breeds to take the title to eighty acres of land in severalty; but it was specially agreed that the right to take the eighty acres should be within certain well defined limits. See 10 St. at Large, 1109.

No such limitation having been placed on the right to locate the Sioux half-breed scrip, it is only reasonable to infer that congress contemplated that it probably would be used in all parts of the country. But, as we have before pointed out, it is hardly to be presumed that congress thought that these half-breeds, who had not at that time severed their

tribal relations, and did not do so until more than thirty years later, would scatter all over the United States and take lands under this scrip.

If congress did contemplate that this scrip would be used in all parts of the country, and at the same time did not contemplate that the half-breed would so use it, the only logical conclusion is that it expected that the scrip would and would be used by third persons, for the acquirement of lands, or that the half-breed would use his scrip by the aid of other persons in the location and disposition of his land.

Two things are perfectly apparent from a careful examination of the Act of 1854:

1. That the act did not contemplate settlement on the land, by the half-breed, whether surveyed or unsurveyed.

2. That the law did not require any act of personal service upon the part of the half-breed, as a condition precedent to his right to earn the land.

In the light of these propositions let us examine some of the objections of the Secretary.

One of them is that the scripee "never had direct contact with the land." What provision is there in the law requiring the scripee to have direct contact with the land? The law does not require residence, either upon surveyed or unsurveyed land. Why, therefore, should the scripee come in contact with the land? What purpose would be subserved by it? Would it benefit the government in any way to have the scripee go upon the land, look at it and

then leave it the next instant? And if the scripee saw fit to go to the land office in person, or send an agent, and to locate his scrip on land without a personal examination, what provision of the law would it violate? In such event the government would receive the scrip for cancellation and would have discharged its obligation. Why, therefore, should the land officers complain?

If this had been the case of a homesteader or pre-emptor, there would be some virtue in the objection that there "had been no personal contact with the land," for those acts specifically provided that the applicant should take up his residence on the land and improve and cultivate it; and personal contact with the land is necessary in order to carry out these declared purposes of the law. But such reasons are utterly lacking in the case of the Act of 1854.

Another objection of the Secretary is "that the improvements were not placed upon the land under the personal supervision of the scripee."

But improvements were not required as a personal act of service, but in order to give notice to intending settlers, and the improvements would serve the purpose of giving notice, no matter who placed them on the land.

Another objection of the Secretary is that the improvements were not made for the personal use of the scripee and that the land was not taken for her personal use.

What personal use did the law require the scripee to make of either the improvements or the

land? It did not require her to live in the house that was constructed. In fact the Secretary himself admits this for in the case of Allen vs. Merrill, 8 L. D., on page 219, speaking of the improvements, he says: "It is not said that he must have a dwelling there."

What, then, does the Secretary mean by his persistent reference to improvements for the scripee's personal use, if no use whatever was required to be made of them?

Again, what use did the law require the scripee to make of the land? Did it require him to reside on it, even for an hour? Did it require him to cultivate even so much as a foot of it? If not, what significance is there in the Secretary's objection that the land was not taken for the scripee's personal use?

Here again we say, that if this had been the case of a homesteader or pre-emptor, there would be some force in the Secretary's objection that the land was not taken for the personal use of the applicant; for the fundamental purpose of both of these acts was to secure permanent and bona fide settlers upon the public domain; and in order to carry out this design it was absolutely essential to require residence, improvements and cultivation, in other words, *a personal use of the land.*

The administration of the public land laws, so as to effectually carry out the purpose of the government, has been a most difficult problem, and the Department has had to contend against many

fraudulent practices, evasions and violations of the law.

In order to obviate and circumvent these evasions and violations of the law, the utmost vigilance, scrutiny and supervision have been required; and, as a result, there has grown up in the Department a rigid set of rules, a system of espionage and a spirit of suspicion, unknown to any other branch of our government.

The assumption by the Secretary that the purpose of the Act of 1854 was similar to that of the homestead and pre-emption acts, and that congress intended, as he puts it, "to express the same general idea," has led him into the error of applying to the Act of 1854 the same rigid rules of construction that have been developed in the land department in the course of its administration of the laws relating to the settlement of the public lands. Therefore, we find, running all through his decisions in these scrip cases, the same expressions we would expect to meet with in cases brought against a homesteader or pre-emptor.

In fact, so completely has the Secretary surrendered himself to this misconception of the nature and purpose of the Act of 1854, that he has brought with him to the consideration of this case, not only those stringent rules of construction, but also that spirit of prejudice and suspicion peculiar to the Department, and to which we have heretofore referred.

We do not mean to impute any evil intention to the Secretary, but the fact remains, nevertheless,

that his opinion contains many positive misstatements of fact as to the condition of the record.

In his opinion, speaking of the manner in which Stram had disposed of her scrip, he says: "The scripee disposed of her scrip, surrendering possession thereof to some one now *unknown*," and "the scrip, after many years, and after passing through several hands, lodged in the hands of Frank W. Eaton"; and a little further on says: "She had, as a matter of fact, sold the scrip long prior to the location," although, not only was there no evidence that the scrip had been "disposed of years before," or that it had "passed through several hands," but the Secretary himself, in a former part of his opinion, states that Stram and her husband executed the powers of attorney attached to the scrip on May 25, 1883, only three weeks before Eaton located it, Record, p. 65, Fol. 193, and both the Register and Receiver found that "she parted with the scrip and signed powers of attorney, *shortly* before the location." Record, p. 66, Fol. 197.

Further on in the opinion the Secretary says: "He (Eaton) employed others to make slight improvements on the lands in question which were scarcely deserving of the name," although the Record, p. 117, Fol. 350, shows that there was a "house 14x16 feet, with a floor and roof, door and window, bunk and table," and one-half acre of land cleared. Such improvements would have been ample even in the case of a pre-emption filing, where residence is required, especially as this land was, at that time, 125 miles from a railroad.

Again, he says: "It was a matter of no mo-

ment to her where the scrip was located, or *whether it was located at all or not.* Her actual interest in the matter ceased when she disposed of the scrip;" although the undisputed evidence shows that a part of the consideration was not to be paid to Stram, until "After the location and adjustment of the scrip" and the execution by her of a deed to Eaton, and that this was a part of the original agreement. Record, p. 113, Fol. 340. We do not mention these facts merely to controvert these mis-statements of the Secretary, for, under defendants' theory of this case, even if the scrip had been disposed of "many years before," and even if there had been no improvements whatever placed on the land, the Secretary would not have been justified in cancelling the scrip locations.

But we have mentioned these facts rather for the purpose of showing the attitude of mind in which the Secretary approached the consideration of this case; that he proceeded to consider it in the same spirit of suspicion that would have animated him in a pre-emption contest where the applicant had been charged with an attempt to commit a fraud upon the government, an act which would have been *malum in se,* whereas, in the case of the scrip location, conceding that the act was invalid, it was merely *malum prohibitum;* that he started out with the preconceived notion that the entire body of laws relating to the public lands, and all the rules of construction peculiar to the Department, were applicable in a case of this kind. The Secretary seems to have jumped to the conclusion that,

from the *bare fact* that congress had assigned the administration of this law to the same department whose duty it was to administer the public land laws, it necessarily followed that the Department had the same duties to perform in the one case as in the others, and that in the performance of that duty the Department was governed by the same rules of construction. He does not seem to have stopped to consider that, as the fundamental purposes of these laws are different, the rules of construction should, therefore, be different.

Now, what duty did the Department have to perform in administering the Act of 1854? Simply the ministerial or clerical duty of seeing that the titles to the lands which the half-breeds might select were issued to the half-breeds and to no one else.

The contract provision in the Act of 1854 is as follows: That upon the execution of a "complete relinquishment" of their title in the reservation by the half-breeds, the government would cause to be issued to each half-breed "certificates or scrip for the same amount of land" they had relinquished.

What was the condition to be performed by the half-breed before he was entitled to receive his land from the government? Simply to convey his interest in the reservation. But this he had already done before the scrip was ever issued. Therefore, when this law was turned over to the Department to administer, the half-breed had already performed his half of the contract, and all that remained was for the Department to see that the *evidences of title for*

an equal amount of land were issued to the half-breed.

There was no supervisory power vested in the land officers to see that he should take any specific piece of land; that he should not sell it; that he should settle upon, cultivate or improve it; and the only thing in the law that could possibly be construed as committing any judicial discretion to these officers was to see that the scrip was genuine, that it was offered by the scripee or some one authorized by the scripee to locate it, and that sufficient improvements were placed on the land to warn intending settlers, if the half-breed should exercise the privilege of locating his scrip on unsurveyed land.

Up to this point in the argument our only purpose has been to call attention to the nature and design of the Act of 1854; to show that the Secretary entirely misconceived its purpose, and to reproduce, in so far as we could, the atmosphere in which this case was tried and determined by the Department. We come now to a more critical examination of the Secretary's objections to the manner of the scrip locations, and to a more careful presentation of the special defenses of these defendants.

IMPROVEMENTS.

The first objection raised by the Secretary to the manner in which the locations were made, is, that the improvements were not made "by or under

the personal supervision of the scripee," and that they were not made for her "personal use and benefit," and that the scripee had not had any direct connection with the land, and was not claiming it "for her own personal use." It is not claimed by the Secretary that these requirements are made by the language of the statute itself, and it becomes necessary, therefore, to inquire what the purpose of the law requiring improvements was, in order to ascertain whether the construction of the Secretary is right.

It will be noticed that the statute does not require any improvements whatsoever upon surveyed land. In the case of surveyed land the scripee, or his duly authorized agent, could go to the land office, locate his scrip, receive his title and dispose of the land as he saw fit, without taking up a residence, without making improvements and without ever having seen the land or knowing where or what it was. It is evident from this that the provision as to improvements was not in the nature of a *personal act of service* which must be performed as a condition precedent in order to earn the right to the land, in the same sense that improvements were required of the homesteader and pre-emptor, for, if it had been intended to make this requirement as a condition precedent to the *right to earn the land;* the same requirement would have been made as to *surveyed* land. The purpose of the law in requiring improvements on unsurveyed land was simply to give notice to intending settlers. It is well known that the pre-emption and homestead laws do not

provide for filings upon unsurveyed lands, but they do permit prospective applicants to settle upon them and thereby gain a preferred right to file on them when surveyed. Now, if the Act of 1854 had permitted scrip to be located on unsurveyed land without improvements being made, many settlers would have been misled, and would have gone upon these lands and made improvements, only to find that the lands were already taken, under the scrip locations, when the surveys were completed and they made applications to file.

The right to file upon unsurveyed lands is one that is rarely granted. In the case of these half-breeds, it was the extension of an unusual and additional *privilege*. But, under the construction given it by the Secretary, it is converted into a burden, a restriction and a limitation. Why should the government make it more difficult to acquire unsurveyed than surveyed land? Why should the government say to these half-breeds, if you will surrender your interest in the reservation we will permit you to file upon surveyed lands and as to these no requirements are made, except the presentation of your scrip at the land office; but if you take unsurveyed lands the condition precedent is prescribed, *as a right to obtain the land,* that improvements be placed thereon, "under your personal supervision," and that they be made "for your own personal use and benefit?"

What special virtue is there in unsurveyed lands that should require some *personal* act of service in order to obtain them, while as to surveyed

lands, a formal application is all that is necessary?

We contend that the requirements in regard to unsurveyed lands were not in the nature of a burden, or condition precedent, but in the nature of an additional privilege.

Congress said to the half-breeds, if you will surrender your interest in the Lake Pepin reservation, we will permit you to take "in exchange," not only surveyed lands but will also grant to you the unusual and additional privilege of taking unsurveyed lands. But, if you exercise this privilege, you must so use it as not to injure others. Settlers are constantly going upon unsurveyed lands in anticipation of their being opened to settlement, and if you were allowed to file upon such lands without in some way indicating that prior rights had attached, these settlers would be misled and would lose their time and improvements. Consequently some improvements must be placed on unsurveyed lands to serve as notice to intending settlers.

This was the sole and only purpose of the requirement as to improvements on unsurveyed lands.

But counsel says that the purpose of congress in requiring improvements on unsurveyed lands could not have been to prevent conflicts with prospective settlers, for the reason that neither homesteaders or pre-emptors were permitted to settle on unsurveyed lands until after the passage of the Act of 1854.

Our associate, Mr. Washburn, has gone into this question so thoroughly, and has answered coun-

sel so completely, that we will not burden the court by a repetition of his argument.

A comparison of the homestead and pre-emption acts with the Act of 1854, will show the absurdity of the claim that congress intended that the improvements should be placed upon the land "by or under the personal supervision of the scripee, and that the land should be taken for his exclusive use and benefit."

Both of the former acts specifically required residence, improvements and cultivation. But no one has ever been heard to claim, nor would counsel claim, that a homesteader or pre-emptor is required by the law to build his house himself or to plow his land with his own hands.

If neither a homesteader or pre-emptor is required to make the improvements on his land in person, what provision is there in the Act of 1854, or what reasonable reason outside of the act can be given, that requires the scripee to make his improvements in person, and that they be made for his own personal use, especially as the Secretary himself admits that no use whatever is required to be made of them after they are placed upon the land.

The requirement by the Department that improvements should be made "for the personal use and benefit" of the scripee, and "that the Indian has a direct connection with the land, and is claiming the same for his personal use," was made because of the misapprehension that the purpose of the Act of 1854 was the same as that of the homestead and pre-emption acts; and we shall show that the ex-

pressions quoted above were appropriated bodily from those acts.

Sec. 2290, R. S., provides, that the homesteader shall make an affidavit:

> "That such application is made *for his exclusive use and benefit*, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly *for the use or benefit of any other person.*"

Sec. 2262, R. S., provides, that the pre-emptor shall make oath:

> "That he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it *to his exclusive use.*"

These acts themselves specifically required that the settler should take his land "for his own exclusive use and benefit." But there is no such provision in the Act of 1854, or anything that resembles it.

Now, how does it happen that congress was so careful to incorporate this provision in the homestead and pre-emption acts, and omitted it from the Act of 1854?

There is but one conclusion that can be drawn. Congress intended that homesteaders and pre-emptors should take their lands for "their own exclusive use and benefit," and, consequently, so provided in the act itself; it did not intend that these half-breeds

should take these lands for their own exclusive use and benefit, and, therefore, omitted the provision from the Act of 1854.

But the Secretary says the Land Office Circular of January 29, 1872, Copp's Land Laws, 723, provided that the improvements must be made "by or under the personal supervision or direction of the scripee," and "that they are for his personal use," and "that the Indian has a direct connection with the land, and is claiming the same for his personal use."

That is true. But if the law did not make any such requirement, the land officials could not; and the circular, being an enlargement of and addition to the law, was invalid.

In Hartman vs. Warren, 76 Fed. Rep., 162, the court says: "The land department may undoubtedly make reasonable regulations for the conduct of the business instructed to it and the discharge of the duties imposed upon it, provided, always, that they are not inconsistent with the legislation enacted and the policies adopted by congress."

We have already stated our reasons for the belief that the law required improvements on unsurveyed lands merely for the purpose of giving notice to intending settlers; but there are additional ones.

The first circular providing how this scrip might be located was issued March 21, 1857, and will be found in 1 Lester, 627.

The second circular was issued February 22, 1864, and will be found in Copp's Public L. L. 721. Neither one of these circulars contains the provis-

ion found in the Circular of 1872, nor anything that bears any resemblance to it. Consequently, it would appear, that for a period of eighteen years, the land officers placed no such construction upon the law relating to improvements as the Secretary now does.

As bearing out our contention that the provision of the law, in regard to unsurveyed land, was not in the nature of an absolute condition precedent but was for the purpose of giving *notice*, we call attention to one of the provisions of the Circular of 1857, which reads as follows:

> "Where the scrip may be located on unsurveyed lands outside of the reservation on which the half-breed has improvements, and which is not reserved by government, his application for location should be accompanied by a diagram and description, denoting natural objects and distances, so as to fix with certainty the exact locality wanted, *serve as the best notice in our power to settlers, that conflict may be avoided*, and enable you, when the public surveys are made, to designate the legal subdivisions embracing the location." (Italics our own.)

Evidently the land department, at this time, thought the purpose of improvements was simply to give notice to settlers, and to prevent conflicts.

If anything further were required to show the unreasonableness of the requirement, in regard to improvements, made by the Circular of 1872, it is

furnished by the absurd reasons assigned by the circular itself for such requirement.

The first section of that circular reads as follows:

> "It has been brought to the notice of this office that Sioux H. B. Scrip has frequently been filed in the local land office for unsurveyed lands, and that, under the shadow of *title thus acquired, the land has been denuded of the timber or otherwise depreciated*, and after the survey the parties would allow the time for adjustment to pass without action, and then *withdraw the scrip from the office, and file it for, or relocate it upon, other land.*" (Italics our own.)

The circular then goes on to say that with a view to remedy this evil the land officers shall thereafter require that the improvements be made "by or under the personal supervision of the scrip," and that the scripee shall have a direct connection with the land," and "claim it for his own personal use."

The evil complained of is the location of scrip on unsurveyed land, denuding the land of its timber, then withdrawing the scrip and filing it upon other land. The remedy proposed is that the improvements shall be placed upon the land by the scripee and that he shall have direct contact with the land.

But how does the proposed remedy obviate the evil complained of?

Suppose that after this circular was promul-

gated the land officers had required the half-breed to make his improvements in person, to file his scrip in person and to "have a direct connection with land;" and the half-breed had denuded, or had permitted others to denude, the land of its timber, and had then been permitted to *withdraw the scrip and file it upon other land;* would the evil complained of have been corrected? Certainly not. The evil complained of did not grow out of the fact that improvements were not made upon the land by the scripee in person but out of the unwarranted and unauthorized practice of the land officials themselves in permitting *scrip to be withdrawn* after it had once been located.

The statute never contemplated that the scripee should have the right to more than one location, any more than it contemplated that the homesteader or pre-emptor should have more than one entry.

If the land officials had never permitted the withdrawal of scrip, the evil complained of could never have arisen, and the only thing that was necessary for the Secretary to do to check the evil was to instruct the land officers to discontinue the practice of permitting the scrip to be withdrawn after it had once been located.

Our conclusion is, therefore, that for eighteen years immediately after the passage of the law the construction of the Department did not require improvements to be placed upon the land "by or under the personal supervision of the scripee," and "that they are for his personal use;" that this was the correct interpretation of the law; that the only

purpose of the law in requiring improvements was to give notice to third persons; that the provisions of the circular of 1872, requiring improvements to be made "by or under the personal supervision of the scripee," was an enlargement of the terms of the statute and, therefore, invalid; that the reasons assigned by the circular itself for its requirements are absurd, and that the remedy proposed is utterly in effectual to prevent the evil complained of.

No Improvements Necessary.

It has already been shown that improvements were actually made in this case. But the defendants contend that, under the facts in this case, no improvements whatsoever were necessary. We have seen that the only purpose of the improvements was to give notice to intending settlers. The record discloses that the only person who ever claimed any interest in this land, besides those claiming under the scrip, was Hyde.

But the decision of Secretary Vilas, upon which the plaintiff in this case relies, holds that Hyde never gained any right to the land, and that the fraudulent contract into which he entered would have prevented him from obtaining the land even if there had been no scrip locations thereon.

Therefore, under the facts, there was no one who would have been injured even if there had been a failure to place any improvements on the land.

To show the absurdity of requiring improvements where there are no third persons claiming under adverse rights, we need only give a very simple illustration. Suppose that a scripee goes upon unsurveyed land and, in an attempt to comply with the law as to improvements, merely chops down a tree, and, after the land had been surveyed, had gone to the land office to have the scrip adjusted to the surveyed land.

Upon the Secretary's theory as to the necessity for improvements, we can imagine the following dialogue as taking place:

Scripee: Mr. Register, sometime ago I located my scrip on the south half of section 2. I understand that the land has since been surveyed and I would like to have the scrip adjusted.

Register: Since you located your scrip we have learned that all you did in the way of improvements was to chop down a tree. Is that true?

Scripee: That is correct, Mr. Register.

Register: Then we cannot permit the adjustment of your scrip to this land, for chopping down a single tree is manifestly not a sufficient compliance with the law as to improvements.

Scripee: Has my failure to comply with the law forfeited my right to the scrip?

Register: Oh, no, it simply prevents you from obtaining an adjustment to the original location. Here is your scrip and you are at liberty to locate it

upon any of the public lands not otherwise appropriated.

Scripee: Mr. Register, is the south half of section 2 still vacant and unclaimed?

Register: Yes.

Scripee: Can I locate my scrip upon that land?

Register: Certainly. The land has been surveyed and is open to settlement; no one else is claiming it and it belongs to a class of lands subject to the location of such scrip.

Scripee: Mr. Register, might I inquire how it is that I could not acquire this land under my original location because of the insufficiency of my improvements, but do acquire the same land under the subsequent location; although in the meantime I have made no additional improvements?

Register: Why, that is perfectly plain. Your original location was on unsurveyed land. In such cases the law specifically provides that improvements shall be placed upon the land. You had failed to comply with the law in this respect; therefore, your location was invalid, and no title could pass to you through an invalid location. But your subsequent location was on surveyed land. In such cases the only requirements are that the land shall be unappropriated and of a class subject to the location of such scrip. All these conditions existed when you filed on the surveyed land, and, there-

fore, the location of the scrip was proper and regular.

And the scripee walks out of the land office, with his title to the land, marvelling more than ever, at the almost super-human wisdom that is required to administer the public land laws.

The law requires that one must be a citizen, or have declared his intention, to enable him to make a pre-emption filing. But in the case of Jacob H. Edens, 7 L. D., 229, the claimant made his settlement while he was an *alien*. Notwithstanding this fact, Secretary Vilas held that his entry should be allowed because it appeared that he had afterwards declared his intention to become a citizen *before any adverse claims had attached.*

This doctrine is also laid down in the following cases:

Kelly vs. Quast, 2 L. D., 627.
Mann vs. Huk, 3 LL. D., 452.
R. R. Co. vs. Painter, 6 L. D., 485.

Likewise, the defendants claim that as no *adverse rights* had attached in the case at bar, either at the time the scrip was located or adjusted, no one would have been injured even if there had been no improvements.

This disposes of the Secretary's first objection.

II.

Was the Provision of the Act of 1854, Prohibiting Assignments of the Scrip, Intended to Prohibit and Prevent Conveyance of the Lands to be Taken Under the Scrip, Until After the Scrip had Been Located?

The Secretary's second objection to the validity of the scrip locations, and his second ground for cancelling the locations, was the manner in which Eaton obtained the title to the land from Stram.

It will be remembered that on the 23rd day of May, 1883, Stram gave a power of attorney to Eaton to locate the scrip in her name, and at the same time gave a power of attorney to Merritt to sell the land after the scrip had been located.

Eaton caused improvements to be made upon the land, as it was at that time unsurveyed, and, on the 16th of June, 1883, located the scrip in the name of Stram.

Shortly after the location, Merritt, as attorney in fact for Stram, conveyed the title to Eaton.

The Secretary's view of this transaction is, that the purpose of the act in prohibiting assignments of the scrip was to prevent conveyances of the land or agreemnts to convey, until after the locations of the scrip; and, as this was the purpose of the act, that the execution and delivery by Stram, before the location of the scrip, of a power of attorney to convey the land was a mere device to evade the provisions of the act prohibiting conveyances of the land.

In order that we may not be reasoning from false premises in the discussion of this question, let us first ascertain definitely just what it is that the Secretary complains of. In the middle of page 217, of the case of Allen vs. Merrill, 8 L. D., after referring to the fact that the usual manner of using this scrip was by two powers of attorney, one to locate the scrip and the other to convey the land when located, and after stating that the use of the power of attorney to locate alone, is lawful, he says:

> "When the location is made, if validly made, the title vests at once in the person to whom the scrip was issued; *and thereupon a conveyance of the land is executed* by some person who consents to the use of his name as attorney, under the authority of the other letter of attorney, the blanks of which are filled accordingly.
>
> "Thus the title passes to the party owning the scrip. *And thus by circumvention, the thing is done which the statute forbids to be done.*" (Italics our own.)

What is it that the statute forbids to be done, accordng to the Secretary?

To make an agreement before the location, to convey the land after location. Again, on page 216 of this case the Secretary says:

> "While no restriction was put upon his power of alienation of the land *when it should be located,* until that time no other person should have any share or interest in this right."

The construction, therefore, which the Secretary places upon that clause of the act which says: "Thou shalt not assign or transfer scrip," is that it means "thou shalt not convey land *before location* of the scrip."

The statute itself does not prohibit the conveyance of land before location. But the Secretary says that was the purpose of the provision prohibiting assignments of the scrip, and as the arrangement between Stram and Eaton was a mere device to enable them to convey *land* it was invalid. We may admit that the transaction, so far as it affected Eaton's right to obtain the land, was invalid if the *purpose* of the prohibitory clause of the act was to prevent the conveyance of land before location of the scrip.

Having laid down the premise that the purpose of the act in prohibiting assignments of the scrip was to prevent conveyances of the land before the location of the scrip, the Secretary then enters upon an elaborate argument to prove that the use of the two powers of attorney, one to locate the scrip and the other to convey the land after location, was a mere device to evade the provisions of the law prohibiting conveyances of the land.

We shall not stultify ourselves by attempting to prove that two persons could, by such a palpable device, evade the provisions of the law, if the purpose of the law was, as the Secretary asserts, to prevent the conveyance of the land. We admit the

conclusions of the Secretary, it is his premises that we deny.

Both the Secretary and counsel admit that the scripee has a perfect right to convey his land the instant after the location of the scrip.

In other words, both the Secretary and counsel admit that if Stram had located her scrip, either in person or by a power of attorney to Eaton or any one else, and the moment *after* the location had conveyed the land to Eaton, that the transaction would have been valid and that the title would have vested in Eaton.

The reason, and the only reason, that is assigned for the construction of the law that the scripee is prohibited from conveying his land before the location, and is permitted to convey it the instant after location, is that these Sioux half-breeds were incompetent and congress for this reason prohibited them from conveying their land until after the location of their scrip.

According to the Secretary and counsel, if a half-breed should present himself at the window of the land office at Duluth, tomorrow morning at 9 o'clock, with unlocated scrip in his hand, he would, in the eyes of the law, be an incompetent and utterly incapable of taking care of his own affairs. At nine o'clock and five minutes, having located his scrip, he steps forth clothed with all the rights and powers of any citizen as to the control and disposition of property. According to the Secretary and counsel, if a white man had entered into a contract with this half-breed for a conveyance of the land he was en-

titled to, at eight o'clock and fifty-nine minutes, the contract is void. If entered into at nine o'clock and five minutes it would be as valiid and effectual as any contract between individuals.

Before the plaintiff can prevail in this action it must answer two questions:

1st. If congress regarded the half-breed as incompetent and incapable of disposing of his land *immediately before location of the scrip,* why did it permit him to sell his land *immediately after the location?* If he was an incompetent and in need of protection before the location of his scrip, why was he not an incompetent and just as much in need of protection immediately after the location?

2nd. If the purpose of congress was to prevent the conveyance of *land,* why did it prohibit the assignment of *scrip?* Why did congress not say: "Provided, however, that all conveyances of the *land,* prior to the location of the scrip, shall be null and void."

The defendants, on the other hand, contend that neither upon reason nor, under the rules of statutory construction, can the language of the act, prohibiting assignments of the scrip, be interpreted as prohibiting conveyances of the land, prior to the location of the scrip.

They contend that there are only two classes of cases in which congress has ever prohibited the conveyance of land granted by the government:

1. Where the beneficiary is an incompetent.

2. Where the law requires some personal act of service from the beneficiary as a condition precedent to his right to obtain the land, and the restriction upon the right to alienate is made to secure the performance of said act.

The argument that the Act of 1854 prohibited the scripee from agreeing to convey his land because he was an incompetent is untenable, for the reason that if this had been the purpose of the act the scripee would have been prohibited from conveying the land *after*, as well as *before* the location; for if he was an incompetent, he was as much in need of protection after he received his land as before.

We contend that the Act of 1854 does not come within the second class of cases, noted above, for the reason that the statute does not require any personal act of service from the scripee as a condition precedent to his right to obtain the land.

Homesteaders and pre-emptors were required to reside upon and cultivate their lands, and, in order to secure a compliance with these requirements they were prohibited from conveying their lands until they had complied with these provisions of the law.

But the scripees, under the Act of 1854, were not required either to cultivate or reside upon the land; consequently, no necessity existed for a prohibition against the conveyance of the land as in the case of homesteaders and pre-emptors.

Not only were there no reasons for placing any

restrictions upon the right of the scripee to alienate his land, but the defendants contend that the language of the act prohibiting assignments of the scrip will not, under the ordinary rules of statutory construction, bear out the interpretation that conveyance of the land was intended to be prohibited.

The law prohibited assignments of the scrip, but it did not prohibit conveyances of the land.

These pieces of scrip were simply the written certificates of the government that the several half-breeds were entitled to a certain number of acres of land. It was the assignment of these written instruments that was prohibited, not the transfer of the land to be obtained under them.

If A should enter into a written agreement with B to convey a piece of land to him, "but not to your assigns," B could not assign this agreement to C so as to enable C to compel A to convey the title to him. But if B should, pending the agreement convey the *land* to C, A could not, for that reason, refuse to convey the title to B.

The defendants contend that if congress had intended to prohibit the conveyance of the land, it would have said so instead of prohibiting the assignment of scrip. It would have struck directly at the *thing* to be prohibited, instead of prohibiting one thing and leaving it to argument, inference and implication that something else was intended to be prohibited.

They claim that there is a distinction between a prohibition against the assignment of a *right* to land and a prohibition against the transfer of the

land itself, and that the courts have clearly recognized the distinction.

They contend that restrictions upon the right of alienation are not favored in law, and that the courts will never assume that the legislature has intended to prohibit the alienation of land, unless it be by the use of language so clear and explicit that no other interpretation could be placed upon it.

Finally, they say that the purpose of the prohibition against the assignment of the scrip was to compel the issuance of the evidences of title direct to the scripee, in order to prevent the government from becoming involved in disputes over the title to the scrip and land that would have been certain to arise if assignments of the *scrip itself* had been permitted; and they also contend that the prohibition against the assignment of the scrip operated to prevent the possibility of frauds being committed against the government through the location of forged assignments; for, under the law as it stands, the government does not recognize assignments of the scrip, whether forged or genuine, but always locates the scrip in the *name* of the scripee and issues the title direct to him, and hence cannot, under any circumstances, be called upon to redeem the scrip a second time.

The above is a brief statement of the views of the plaintiff and defendants on the prohibitory clause of the Act of 1854.

We propose now to examine this question more at length, and from two standpoints:

1. Were there any good reasons why congress should have placed any restrictions upon the right of these half-breeds to convey the lands they were to receive from the government?

2. If there were such reasons, will the rules of statutory construction permit a court to declare that the language of the act, prohibiting assignments of the scrip, is to be interpreted as prohibiting conveyances of the land, prior to the location of the scrip.

We are first lead to examine, then, the reasons assigned by our opponents for the alleged restriction upon the right of the scripees to convey their lands.

The only reason that the Secretary furnishes for the enactment of the clause of the act prohibiting assignments of the scrip is, that it was intended to prevent conveyances of the land before the location of the scrip. But that is hardly a satisfactory answer for the query still arises, why did congress intend to prevent conveyances of the land, prior to the location of the scrip?

Counsel for plaintiff seems to have recognized this for he goes one step further and says that the half-breed was prohibited from conveying his land, prior to the location of the scrip, for the reason that he was an incompetent and congress regarded him as incapable of taking care of his affairs and disposing of his property.

But counsel has himself destroyed all the argu-

ments he has advanced for the theory of incompetency. He first claims that the purpose of the prohibitory clause of the act, was to protect the half-breed; that congress regarded the half-breed as incapable of taking care of his own property and placed a restriction upon his right to alienate his land to prevent the shrewder white man from getting it away from him.

He then admits that the moment the half-breed locates his scrip he is as free to dispose of his land as anyone. What, then, becomes of the theory of incompetency? If the half-breed was utterly incapable of taking care of his property the moment *before* he located his scrip, by what mysterious mental process was he converted into a competent, by the mere investiture of title, and rendered capable of disposing of his land the moment *after* he located his scrip? If he was in need of the protecting care of the government the instant before he acquired his land, why was he not just as much in need of that protection the instant after he acquired his land? According to counsel, the government regarded the half-breed as in need of guardianship and protection, and attempted to provide him with safeguards, and then abandoned him when he was most in need of protection, and left him to take care of himself. Under the law, a minor cannot dispose of his lands, except through his guardian. But the moment he attains his majority he is invested with that right himself. But this is because he is regarded as having arrived at the age of discretion, in the eyes of the law, when he has attained his majority.

The time is definitely fixed by law, and the change from incapacity to competency is based on common sense and reason. But how could the mere location of a piece of scrip alter or change the mental capacity of the scripee?

Under counsel's theory, two half-breeds, who today have unlocated scrip in their possession, are both incapable of disposing of the property they are entitled to receive under the scrip. Tomorrow, one of them locates his scrip and is instantly converted into a competent; the other remains an incompetent. Yea, this logic leads to still greater lengths of absurdity, for, as we have seen, each half-breed received five different pieces of scrip; therefore, if a half-breed had located one piece of scrip he would, at he same moment of time, be competent to dispose of the land located and incompetent to dispose of the land to be received under the four pieces not located.

Not only is counsel's theory of incompetency untenable, but he has himself furnished us with a witness to disprove it.

In his brief in the court below, counsel quoted quite freely from the report made by George W. Manypenny, Commissioner of Indian Affairs, to congress, relative to the condition of these half-breeds at the time the Act of 1854, was under consideration. We quote from said report as it appears on page 19 of counsel's brief in the court below.

> "The Indian titles to the whole of the country surrounding said reservation are now

extinguished, and the bands to which said surrounding country belonged have removed westward, and many of the less cultivated of said half-breeds are desirous of disposing of their interests in said reserve and following their Indian relatives. Some have gone already. Many of them, however, are represented as being educated, and having judgment and experience sufficient to take care of their own interests. A number of them are said to be men of much intelligence, possessing property and having become citizens of Minnesota and the adjoining states. Some of them have served in the legislature and filled offices of honor and trust in the Territory, while others are engaged in agriculture, mercantile and other profitable pursuits. With them, at least the object of the fostering policy of the government has been attained, in fitting them for civilized life for, in point of intelligence and civilzation, many of them would compare favorably with their white brethren."

A little further on he says:

"I am informed that many of the half-breeds are very competent to manage their own affairs and that they have good improvements on their reserve. It is said that others are altogether incompetent to take care of property. Some of the thrifty half-breeds, it is said, have gone off the reserve and bought land and made improvements, being unwilling to do so on the reserve because they could not have land assigned to them in severalty. No good can result to the half-breeds by the continuance of this occupancy in common. Some legislation will, in my opinion, be necessary before a change can well be made, if for no other purpose than to protect the interests *of such por-*

tion of these people as are incompetent to manage their own affairs." (Italics our own.)

Counsel brings forward this witness and asks us to accept his report as evidence of the fact that these half-breeds were incompetent, and that congress, because of this incompetency, prohibited them from conveying their lands prior to the location of the scrip.

Conceding, for the present, that the report of the Commissioner of Indian Affairs can be received as evidence of the purpose congress had in mind, the report itself disproves the very thing which is sought to be sustained by it.

For, according to the Commissioner, many of these half-breeds were educated and intelligent and perfectly capable of managing their own affairs; but no discrimination is made in the act itself, and the prohibitory clause of the act is applicable to all the half-breeds alike.

Now, if the purpose congress had in view, in incorporating the prohibitory clause of the act, was to protect incompetents, how does it happen that the same restrictions were made applicable to the educated and intelligent to those who had become "Citizens of Minnesota and adjoining states"; to those who were engaged in "mercantile and other profitable pursuits," to those who had held "offices of honor and trust", and to those "who would compare favorably with their white brethren?"

If many of these people were concededly capable of taking care of their own affairs, is it conceivable that congress would use so little discrimina-

tion as to subject them to restrictions for which there was admittedly no reason?

If congress had had this question of competency in mind and had deemed part of them capable and part of them not, would it not rather have been provided, as has been done in scores of cases, that those who were competent should take their lands free from restrictions, and that those who were not should never convey their lands, or that the restrictions should be removed whenever the President, the Secretary, or some other person or tribunal, appointed by law, should determine that the restrictions should be removed, instead of making the restriction apply to all, whether there was reason for it or not?

Again, the report and the act considered together show that congress did not follow the advice of the Commissioner, for the latter only recommended legislation to protect the interests of "*such portion* of these people as are incompetent to manage their own affairs."

But, as we have seen, the prohibitory clause of the act applies to all. It is manifest, therefore, that congress disregarded the advice of the Commissioner.

Counsel admits that part of these half-breeds were competent and part of them were incompetent, and that the prohibitory clause of the act applies alike to both competents and incompetents.

Counsel also admis that the restriction upon the right to alienate the land was only *temporary*, and he must also admit that no person or tribunal

was appointed by law to determine when the restriction should be removed.

~~Counsel also admits that the restriction upon this act by counsel is untenable, for the reason that~~ A careful study of the treaties negotiated by the government with the various tribes of Indians will show that the uniform policy pursued by the government, in negotiating treaties, is not in harmony with the construction contended for by counsel.

A careful examination of these treaties will show:

1. That wherever the government has negotiated treaties with Indians, part of whom were competent and part incompetent, that restrictions have only been placed upon the incompetent and that those who were competent have been left free to dispose of their lands at will.

2. An examination of these treaties will show that wherever restrictions to alienate the land have only been made, *temporarily*, that the law has always provided, definitely and in terms, for some person or tribunal to determine when the disability has ceased and when the restrictions should be removed.

Under the first class, we call attention to the following treaties. Art. 4, of the treaty with the Wyandotts, 10 St. at Large, 1161, provides:

> "To those reported by the commissioners to be competent to be entrusted with the control and management of their affairs and in-

terests, the patents shall contain *an absolute unconditional grant in fee simple; but to those not so competent,* the patents shall contain an express condition, that the lands *are not to be sold or alienated for a period of five years,* and not then without the express consent of the President of the United States first being obtained." (Italics our own.)

Art. 8, of the treaty with the Shawnees, 10 St. at Large, 1057, provides:

> "Such of the Shawnees *as are competent* to manage their affairs shall receive their portions of the aforementioned annual installments in money. But the portions of such as *shall be found incompetent* to manage their affairs, whether from drunkenness, depravity, or other cause, shall be disposed of by the President, in that manner deemed by him best calculated to promote their interests and the comfort of their families."

Art. 4 of the treaty with the Chickasaws, 7 St. at Large, 451, provides:

> "The Chickasaws desire to have within their own direction and control, the means of taking care of themselves. Many of their people are quite competent to manage their affairs, though some are not capable, and might be imposed upon by designing persons; it is therefore agreed that the reservations hereinafter admitted, shall not be permitted to be sold, leased or disposed of unless it appears by the certificate of two of the following named persons, that the party owning or claiming

the same, is capable to manage and to take care of his or her affairs."

It will be noted in the treaties cited above, and many others might be quoted to the same effect, that the government has made a clear distinction in dealing with Indians between the competent and the incompetent.

We now call attention to a class of treaties where temporary restrictions have been imposed, and which clearly provide the conditions upon which the restrictions may be removed, and name the person or tribunal who shall determine that fact.

Art. 4 of the treaty with the Potawatamies, 7 St. at Large, 185, provides:

> "The United States agree to grant to the persons named in the annexed schedule, and their heirs, the quantity of land therein stipulated to be granted; but the land so granted shall never be conveyed by either of the said persons, or their heirs, unless by the consent of the President of the United States."

Art. 6 of the treaty of the Miamies, 7 St. at Large, 191, provides:

> "The several tracts of land which, by the third article of this treaty, the United States have engaged to grant to the persons therein mentioned, except the tracts to Jean Bapt. Richardville, shall never be transferred by the said

persons or their heirs, without the approbation of the President of the United States."

Art. 2 of the treaty with the Chippewas, 10 St at Large, 1167, provides:

> "Said tracts shall be exempt from taxation, levy, sale or forfeiture, and shall not be aliened or leased for a longer period than two years, at one time, until otherwise provided by the legislature of the state in which they may be situated, with the assent of congress."

Art. 6 of the treaty with the Ottoes, 10 St. at Large, 1039, provides:

> "And the president may, at any time in his discretion, after such persons or family has made a location on the land assigned for a permanent home, issue a patent to such person or family, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale or forfeiture which conditions shall continue in force, until a state constitution embracing such land within its boundaries shall have been formed, and the legislature of the state shall remove the restriction."

A third class of treaties provides that the lands shall never be sold to third parties.

Art. 12 of the treaty with the Senecas, 7 St. at Large, 350, provides:

> "The lands granted by this agreement and

convention to the Seneca tribe of Indians, shall not be sold or ceded by them, except to the United States."

Art. 9 of the treaty with the Ottawas, 7 St. at Large, 361, provides:

"The lands granted by this agreement and convention to the said band of Ottawas, residing at Blanchards Fork, and Oquanoxas Village, shall not be sold or ceded by them, except to the United States."

The above selections show that whenever the government has attempted to surround the Indian with safeguards, there has been no uncertainty, either as to the language used to express the intent, or as to the methods and machinery adopted to carry out the declared purpose of the law. They show also that judgment and discretion have been exercised, and that where reasons have existed for the imposition of restrictions, they have been made, and where reasons for restrictions are lacking, they have not been made.

In the cases cited above, where it was intended to perpetually prevent the Indian from conveying his land, the language used is so clear and explicit that there can be no possible doubt as to its meaning. Where the prohibition against conveyance is only temporary, the treaties invariably provide the conditions upon which the restrictions are to be removed, and name the person or tribunal who is to determine the fact; and where the government has

dealt with Indians, part of whom were competent and part incompetent, it has placed restrictions upon the incompetent and left the competent free from limitations.

In view of the extreme care which the government has always exercised to define its purpose when dealing with incompetent Indians, and of the clear and explicit language which it has always used to indicate its purpose, it seems to us but little short of the absurd to claim that the purpose of congress, in prohibiting the scripees from assigning their scrip, was to protect the incompetent, when it is admitted that the prohibition applied to the competent as well, and no less absurd to claim that, although congress intended to prohibit conveyances of the *land*, it failed to use the language which would have most clearly and certainly expressed its meaning, but left the question open to argument, inference and implication by only prohibiting assignments of the scrip.

Legislative bodies are supposed to be careful in all their actions, but when they deliberately set out to protect the interests of minors, idiots, insane, or any other class of incompetents, we have a right to assume that unusual caution will be exercised in giving expression to the legislative intent, and that as little as possible will be left for construction.

The proposition that congress regarded the Sioux half-breeds as incapable of taking care of their affairs before the location of their scrip, and as perfectly competent immediately after the location, although in the meantime there had been no

actual change in their condition, and no person or tribunal provided to determine the question of competency, seems to us to be without any support in reason whatever.

Another thing that makes against counsel's theory of incompetency is the provisions of the act itself.

It will be remembered that the act permits these half-breeds to take lands *out of any part of the public domain,* and that they are to hold these lands by *a fee simple title and in severalty.*

The very fact that the act permitted these half-breeds to separate and take lands in different localities, throughout the entire country, and to hold these lands by a fee simple title in severalty, is proof conclusive that congress did not intend to treat them as incompetent.

If the government had regarded these half-breeds as incompetent Indians, it would either have left them on the reservation where they had their homes and improvements, or, if the government desired to obtain their reservation in order to throw it open to settlement, and had considered them as incompetent, it would have set apart a reservation for them in some more remote and less settled part of the country, where they could indulge in the sports and manner of life common to uncivilized Indians, and where they would not interfere with, or be interefered with, by white men. This has been the custom from the earliest history of the country. As settlement and civilization has advanced towards the West and encroached upon the Indian

reservations, the government has negotiated treaties with them for their lands, and set apart reservations for their use in some more remote part of the country.

That congress did not pursue this course with the Sioux half-breeds is strong proof of the fact, that congress did not regard it as necessary to longer colonize them on a reservation, and did not consider and treat them as incompetent Indians.

There is another thing that argues against counsel's theory, and that is, that there is nothing in the language of the act itself to indicate incompetency; and, as we have seen in the numerous treaties heretofore referred to, and in hundreds of others that might be cited, wherever negotiations have been had with incompetent Indians, the language used for their protection has been certain, full and explicit.

As the idea of incompetency has not been expressed in the act itself, counsel asks the court to *assume* that congress regarded and treated these half-breeds as incompetents, from the bare fact that the act applies to Indians.

In order to lay a foundation for this assumption, counsel has cited many cases and has expended much argument to show that the policy has always been to treat Indians as wards of the government.

We deny that this has been the uniform policy of the government, and further on shall cite the court to many instances where the unrestricted

right to take and convey lands has been given to *full-blooded* Indians.

But even if it were admitted that the uniform policy of the government towards full-blooded Indians was to treat them as wards, the admission would have no effect in the case at bar.

Counsel insists on treating these people as *Indians*. But they are not Indians. The very first sentence of the act itself describes them as "half-breeds or mixed bloods." Therefore, it is to be presumed that *all* of them were at least half white, and as the act is also careful to use the word, "mixed bloods," that many of them had a much greater proportion of white blood in their veins.

Is a court to *assume*, in default of language clearly expressing such intent, that the legislature regarded a class of persons, all of whom were half white, and many possessing a much larger proportion of white blood; many of whom, according to the witness counsel has produced, were "citizens of Minnesota and adjoining states," and "had held positions of honor and trust," and "were engaged in agriculture, mercantile and other profitable pursuits" and "many of whom would compare favorably with their white brethren," is a court to *assume* that congress intended to class these people with full-blooded Indians and to treat them as wards of the government?

But it has already been decided that the Act of 1854 does not treat these half-breeds as wards of the government, and that the courts cannot *assume* that they are incompetent.

The Act of 1854 was under consideration in the case of Felix vs. Patrick, 36 Fed., 457, and the same contention was made in that case, as in the case at bar, that the half-breeds were incompetent and wards of the government.

Justice Brewer delivered the opinion, and on page 461 he says:

> "But it is erroneously contended that a different rule should be applied in this case because the plaintiff and his ancestors were Indians; that the law is very tender in respect to the rights of such persons who are not familiar with our laws and methods of transacting governmental or private business, and were ignorant of the disposition which had been made of the scrip. And it is also argued that as Indians they were the wards of the government and could not have asserted their rights to the property, even if they had known what their rights were. *It is not shown that they were not persons of education and intelligence,* or that they were not in fact familiar with the land laws and the methods of governmental business, *or that they were not in fact as competent to look after their rights as any person.* We all know that many of these Indians, *especially the half-breeds,* are well educated, intelligent, and as fully competent to look after their business as any person; and the fact that they were Indians and maintaining tribal relations, and were in a certain sense the wards of the government, did not debar them from a hearing in the courts of Nebraska."

Justice Brewer says:

> "It is not *shown* that they were not persons of education and intelligence, or that they

were not in fact as competent to look after their rights as any person."

It is evident from this language that Justice Brewer could not find anything in the act itself which conveyed the idea of incompetency, and that he also thought the court had no right to *assume* it; for, if it could be assumed, it would not have to be "shown."

The very fact that it appears by the Ninth Art. of the treaty of Prairie du Chien, 7 St. at Large, 330, that the chiefs of the Sioux nation requested that the Lake Pepin Reservation be set aside for the half-breeds so that they might live apart from the full bloods, and that the request was granted, shows that both the full bloods and the government recognized the fact that there was a difference between the full bloods and half-breeds.

Furthermore, the government has, in its treaties with Indians, clearly recognized the fact that there is a vast difference in point of intelligence between half-breeds and Indians.

In confirmation of this we call attention to the following treaties:

The seventh paragraph of Art. 2 of the treaty with the Chippewas, 10 St. at Large, 1110, provides:

> "Each head of a family or single person over twenty-one years of age at the present time of the *mixed bloods*, shall be entitled to eighty acres of land, to be selected by them under the direction of the President, and which

shall be secured to them *by patent in the usual form.*" (Italics our own.)

In Art. 3 of the same treaty, the provision in regard to the *full bloods* is as follows:

> "The President may, from time to time, at his discretion, as fast as the occupants become capable of transacting their own affairs, assign to each head of a family or single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, *with such restrictions of the power of alienation as he may see fit to impose.*" (Italics our own.)

Art. 6 of another treaty with the Chippewas, 10 St. at Large, 1169, provides:

> "And such of the mixed bloods as are heads of families, and now have actual residences and improvements in the ceded country, shall have granted to them, *in fee*, eighty acres of land, to include their respective improvements." (Italics our own.)

In Art. 2 of the same treaty, the provision, in regard to the *full bloods* is as follows:

> "The president may, at his discretion, as the occupants thereof become capable of managing their business and affairs, issue patents to them for the tracts so assigned to them; said tracts to be exempt from taxation, levy, sale or

forfeiture, *and not to be aliened or leased* for a longer period than two years, until otherwise provided by the legislature of the state in which they may be situated, with the assent of congress." (Italics our own.)

Art. 7 of the treaty with the Winnebagoes, 10 St. at Large, 1174, provides:

"And such of the *mixed bloods,* as are heads of families, and now have actual residences and improvements of their own, in the ceded country, shall each have granted them, *in fee,* eighty acres of land, to include their improvements." (Italics our own.)

In Art. 4 of the same treaty, the provision as to the *full bloods* is as follows:

"The President shall, from time to time, as the Indians may desire it, assign to each head of a family, or single persons over twenty-one years of age, a reasonable quantity of land, in one body, not to exceed eighty acres in any case, for their separate use; and he may, at his discretion, as the occupants thereof become capable of managing their business and affairs, issue patents to them for the tracts so assigned; said tracts to be exempt from taxation, levy, sale, or forfeiture, until otherwise provided by the legislature of the state in which they may be situated, with the assent of congress; *nor shall they be sold or alienated* within fifteen years after the date of the patents, and not then, without the assent of the President of the United States, being first obtained." (Italics our own.)

Scores of other treaties to the same effect might be cited, but the above illustrate the principle as well as a hundred.

Thus we see that the government, in dealing with Indians, has made a clear distinction between the full-bloods and half-breeds, and has, in many cases at least, granted lands to half-breeds without restrictions, while, *in the same treaty,* limitations have been placed upon the right of the full-bloods to convey their lands.

In view of these facts, how can it be claimed that the courts have a right to *assume* that congress regarded the Sioux half-breeds as incompetent, and for this reason intended to prohibit them from conveying their lands?

But counsel contends that his construction must be placed upon the act because Mr. Manypenny, the Commissioner of Indian Affairs, and Mr. Wright of the Committee on Indian Affairs, gave it as their *opinion,* at the time the bill was before congress, that some legislation would be necessary to protect the interests of *"such portion* of these people as are incompetent to manage their own affairs." (Italics our own.)

A sufficient answer to this contention is, that an examination of the reports of the committeemen and of the act show, upon their face, that congress did not adopt the *opinions* of the committeemen, and did not follow their advice.

The committeemen advised some legislation for *"such portion* of these people as are incompetent." But counsel admits that the *act as passed,*

applies to both the competent and incompetent. It is apparent, therefore, that congress did not follow this advice; at least did not follow it *as given*. If it did not follow it as given, upon what theory is the court to assume that it was followed in part, or was followed at all?

It was a question for congress to finally determine what legislation was necessary, and it evidently decided from what it had heard and knew of the intelligence of these people that no restrictions were necessary.

The conclusive answer, however, to counsel's contention is, that in construing an act it is not competent to refer to the debates, or the expressions of opinion by the individual members of the body, in order to ascertain the purpose of the act.

It requires but little argument to show, that the intention of the legislature cannot be gathered from what individual members may have said concerning the purpose of the act. Congress is composed of between three and four hundred members. Some of them very much more intelligent, active and influential than others, but all are equal in power, and each one has as much right to impress his own peculiar views on enactments as the others. But comparatively few of this large body of men, ever express their views on any particular act, and if resort can be had to the views of those who expressed themselves, then by the same reasoning, those who did not give expression to their views could be subpoenaed to ascertain if their views corresponded with the others.

Again, it is well known that there are very few acts presented but there are many reasons given for its passage, and some members vote for it for one reason and some for another.

Furthermore, it sometimes happens, even in congress, that a member may give very foolish reasons for a very sensible measure, but this would not deter others from favoring it. If this method of ascertaining the intention of the legislature were resorted to, to clear up ambiguities, the difficulties would only be multiplied a hundred fold; for in such case the court would have to construe and interpret the law guage of each member who had given expression. Such a course of proceeding would entail endless delay, multiply existing difficulties, and result in the defeat of the present practical and business like administration of the law.

It is doubtless true that the courts may, under certain circumstances, refer to public proceedings, in order to aid them in interpreting a statute. One instance is, reference to the records to ascertain whether certain amendments were adopted or rejected. But this is upon an entirely different principle, for in such cases there is the *concerted action* of the body as a whole, as distinguished from the *individual expression* of a member.

Our position is not only founded on reason, but is sustained by the authorities.

In a late case, U. S. vs. Wong Kim, 169 U. S., 699, it was declared that the intention of the congress which framed the Fourteenth Amendment must be ascertained from the language of the act

itself, and that the debates in congress were not admissible for that purpose.

In the case of Aldridge vs. Williams, 3 Howard, 24, the court says:

> "In expounding this law the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of congress in the debate which took place upon its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of the members of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather the intention from the language there used, comparing it, when ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

The purpose of the act, then, must be ascertained from the language of the act itself, and not from some committeeman's opinion.

In the opening part of our argument on the construction to be given to the prohibitory clause of the Act of 1854, we stated that there were only two classes of cases to be found where restrictions upon the right to convey land had been made by the government.

1. Where the beneficiary is an incompetent.

2. Where some personal act of service was required of the grantee, as a condition precedent to his right to obtain the land.

We think it is manifest that congress did not regard these half-breeds as incompetent, because:

1. There is no language in the act indicating such a purpose, and a careful examination of the treaties negotiated with Indians, shows that when the government has intended to treat them as incompetents it has used language so clear and explicit that there could be no possible doubt as to its meaning.

2. Because, as Justice Brewer decided in the case of Felix vs. Patrick, *supra*, the courts have no right to assume that they were treated as incompetents in default of language clearly expressing such intent.

3. Because these half-breeds are shown to have been unusualy intelligent, and the history of the government's dealings with Indians shows that it has made a clear distinction between half-breeds and full-bloods.

4. Because the proposition that congress regarded these half-breeds as incompetent, and for this reason prohibited them from conveying their lands before the location of the scrip, but permitted them to convey the instant after location, is an argument that reduces itself to an absurdity and falls of its own weight.

If, therefore, these half-breeds were not regarded as incompetents, there was only one other

reason why congress should have placed any restrictions upon their right to convey, and that is because some personal act of service was required of them as a condition precedent to their right to obtain the land.

But no such act was required by the law. It is conceded by both the Secretary and counsel that these half-breeds could take their scrip, go to the local land office, locate the scrip upon any public land, not otherwise appropriated, and transfer the land the instant after the location, without ever having seen the land, without residing upon it for an instant, and without cultivating a foot of it.

Manifestly, therefore, no personal act of service was required of the scripee which necessitated a temporary restriction upon his right to convey, in order to secure the performance of the act.

Not only was there no *reason* why congress should have prohibited the scripee from conveying his land, but if congress had intended to do so, the act itself would have contained some specific provision requiring him to make *proof* of the fact that he had not conveyed, or agreed to convey, his land.

But neither does the act make any such requirement, nor has the Department, as a matter of practice, ever required any such proof.

It is but little short of the preposterous to assert that congress deliberately prohibited the scripees under this act from conveying their land until after they had located their scrip, and yet utterly neglected to require any proof whatsoever of the fact before issuing the title to them.

According to the Secretary, the conveyance of the land, before the location of the scrip, was such an essential violation of the Act of 1854 as to warrant him in canceling the location of the scrip three years after it had been located, as was done in the Stram case.

And yet congress made no provision whatever to guard against the violation of this most vital feature of the act.

The scripee could go to the land office, offer his scrip, receive his land, and no questions were asked and no proofs were required; and the only possible way of discovering whether he had violated this alleged provision of the law by conveying his land, was by reliance upon the accidental discovery of the violation by some contestant, who would call the Department's attention to the fact through his desire to obtain the land for himself.

Such a contention is an impeachment of the intelligence of congress.

If congress had intended to prohibit these half-breeds from conveying their lands, before the location of the scrip, it would have required the scripee to make proof of this fact before the title should issue to him, just as it did in the homestead and pre-emption acts.

Section 2291 of the Revised Statutes, being Section 3 of the Homestead Act, provides: That if the homesteader

> "Proves by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years immediately

succeeding the time of filing the affidavit, *and makes affidavit that no part of such land has been alienated,* then, in such case, he, she or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law." (Italics our own.)

Section 2262 of the Revised Statutes, provides: That every pre-emptor shall make oath,

"That he has not settled upon or improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; *and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself;* and if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, for a valuable consideration, shall be null and void." (Italics our own.)

Now, can it be possible that congress intended to prohibit these half-breeds from conveying their lands, before the location of the scrip, and yet required no proof of this essential fact, before issuing the title to them, while at the same time, it was

so extremely careful to provide that every homesteader and pre-emptor should, in a judicial proceeding, furnish sworn proof of the fact, that he had not conveyed, or agreed to convey, his land?

Of what avail is it to require that certain things shall be done, or not be done, if the law provides no means of enforcing such provisions?

What would be thought of a congress that should provide, that homesteaders should reside upon their land five years, should cultivate and improve it, and should not make any agreement to convey it, prior to the time they should receive their title from the government, and yet should not require proof of any of these facts, but should issue the title to the homesteader, at the end of the five years, without so much as even inquiring whether he had made any agreement to convey his land?

Everyone would say that a congress which enacted such a piece of legislation was utterly devoid of intelligence.

But is it any less absurd to assert that congress intended to prohibit the Sioux half-breeds from conveying their lands, until after the location of their scrip, and yet permitted the title to be issued to them without requiring even a verbal, unsworn statement that no contract had been made to convey the land?

There is but one conclusion to be drawn. In the case of homesteaders and pre-emptors, congress clearly intended to prohibit them from conveying their lands until they had established their resi-

dence upon and cultivation of the lands, and, consequently, was careful to require them to furnish sworn proof of these facts before conveying the title to them. But, in the case of the Act of 1854, congress did not intend to prohibit the conveyance of the land, and, therefore, no proof was required.

Not Only Was There no Reason for Prohibiting the Scripees from Agreeing to Convey the Lands, but, the Language of the Act Itself, Prohibiting Assignments of the Scrip, Cannot, Under the Ordinary Rules of Statutory Construction, Be Interpreted as Inhibiting Conveyances of the Land.

The act itself provides: "thou shall not assign *scrip.*" The Secretary and counsel assert that it means, "thou shalt not convey *land,* prior to the location of the scrip."

In other words, they contend that this prohibitory clause of the act needs interpretation.

The defendants, on the other hand, contend that it interprets itself; that the language of the act means just exactly what it says, that the scripee should not assign the written certificate of scrip; that the government had undertaken to convey the title to him and had issued the scrip as the evidence of his right, but had declined to deal with his assigns and issue the title to them, and, therefore, prohibited the assignment of the scrip.

They contend that the language of the prohibitory clause of the act is as clear as English can make it, and that the only ambiguity that arises in considering it, is by reason of the tortured application that counsel seeks to make of it.

The cardinal rule of statutory construction is that the meaning must be obtained from the language of the statute, if the language is plain; and, if the language is plain and unambiguous, that the statute is its own expositor, and there is nothing for the court to interpret.

It is not within the province of the courts to determine what are, and what are not, the legitimate objects and purposes of legislation. This right belongs exclusively to the legislature, and the courts cannot, under the guise of interpretation, declare that the object of a statute should be one thing, when the language, according to the ordinary meaning of the words, shows that its purpose is something else.

This doctrine is fully sustained by the authorities.

Black, On Interpretation of Laws, page 35, says:

> "If the language of the statute is plain and free from ambiguity, and expresses a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the legislature intended to convey. In other words, the statute must be interpreted literally. *Even though the court should be convinced that some other meaning was really intended by the law making power, and even*

though the literal interpretation should defeat the very purposes of the enactment, still the explicit declaration of the legislature is the law, and the courts must not depart from it."

Sutherland, On Statutory Construction, Sec. 234, says:

"How the intention is to be ascertained is only answered by the principles and rules of exposition. If a statute is certain, plain and unambiguous, so that no doubt arises *from its own terms* as to its scope and meaning, a bare reading suffices; then interpretation is needless."

In section 235, he says:

"It is the intent of the law that is to be ascertained, and the courts do not substitute their views of what is just and expedient. Courts are not at liberty to speculate upon the intention of the legislature, where the words are clear, and construe an act upon their own notions of what *ought to have been enacted.* The wisdom of a statute is not a judicial question, nor can courts correct what they may deem excesses or omissions in legislation, or relieve against the occasionally harsh operations of statutory provisions without danger of doing more mischief than good."

And again in section 237, quoting from Alexander vs. Worthington, 5 Md., 485, he says:

"The language of a statute is its most

natural expositor; and where its language is susceptible of a sensible interpretation, it is not to be controlled by any extraneous consideration." (Italics in these quotaions our own.)

This principle has been applied in a striking way, in the recent case of Cone vs. Nimocks, 78 Minn., 249.

The question that was under consideration in that case was the construction of a statute which provided that a foreign executor or administrator must file an authenticated copy of his appointment in Minnesota before he could foreclose a mortgage by advertisement.

A foreign executor had assigned a mortgage and the assignee had proceeded to foreclose it by advertisement without filing a copy of the appointment of his assignor, the executor.

The foreclosure was attacked and it was urged with much force that there was just as much *reason* for requiring the appointment to be filed where the mortgage was foreclosed by the assignee of an executor as where it was foreclosed by the executor himself.

In the course of the opinion Justice Mitchell said:

> "It may also be admitted that, where the power is exercised by an assignee of a foreign executor or administrator, substantially the same reasons exist for requiring that there be record evidence that the person who executed the assignment was what he purported to be,

to-wit: The personal representative of the deceased mortgagee. Such a case, however, is not within the letter of the statute, and the question is whether there is any rule of construction by which it can be included."

But, Justice Mitchell speaking for the court, further said:

"There is no ambiguity of language here. By its clear and plain language this proviso applies only to the exercise of the power by the executor or administrator. *The mere fact that there existed the same reasons* for applying the same condition to the exercise of the power by an assignee of the executor or administrator, will not justify a court in including such a case within the statute, when, according to its plain and unequivocal language, the legislature has omitted it." (Italics our own.)

Likewise, in the case at bar, counsel urges that there were *reasons* why congress should have prohibited the scripee from conveying his land, prior to the location of the scrip.

We have already attempted to show that there were no such reasons, but conceding that there were, under the authorities cited above, if the language of the act, prohibiting the assignment of the *scrip itself*, will accomplish some *lawful purpose*, then no court has the right or power to say that congress intended to prohibit the conveyance of the land, prior to the location of the scrip.

If the language prohibiting an assignment

of the scrip can be given any legal effect; if an interpretation of the language of the act, as it stands, according to the ordinary meaning of the words used, will lead to a sensible result, and not to an absurd and ridiculous conclusion, then it is not within the province of the courts to declare that there were other and greater objects that could have been accomplished, or that congress *ought* to have legislated differently for half-breeds than it would have for white men, for this, according to the authorities quoted above, would be "substituting the judgment" of the court for the judgment of congress, and would be an interpretation "controlled by extraneous considerations", and not by the plain and ordinary meaning of the statute itself.

The *test,* then, is, will the statute, as it stands, according to the fair and ordinary meaning of the language used, accomplish some lawful purpose? If it will, the statute is its own expositor and there is nothing for the court to interpret.

What lawful purpose, then, does this prohibition against the assignment of the *scrip itself* accomplish?

It prohibits the scripee from assigning his right to the land so as to enable the assignee to demand the title in his own name, but compels the land department to issue the title direct to the scripee, and thus prevents the government from becoming involved in the disputes that would have been certain to arise over the title to the scrip and land, if assignments of the scrip had been permitted. It also protects the government from the pos-

sibility of frauds being committed against it through the location of forged assignments of the scrip.

A very simple illustration will clear away a good deal of the mystery and complexity with which the Secretary and counsel have surrounded this prohibitory clause of the Act of 1854, and will show that no such construction can be given to the act as they contend for.

Suppose that the government should desire to obtain, for military or other purposes, a section of land owned by John Jones, and should enter into a contract with him whereby it would agree, in exchange for his land, to give him an equal amount of land out of any part of the public domain, and should issue to him a piece of scrip certifying that Jones was entitled to receive from the government the title to a section of land to be selected by him, and the agreement and the scrip should contain this provision: "Provided, however, that no assignment or transfer of said certificate or scrip shall be valid." And suppose that, thereafter, but before he had received his title from the government, Jones should agree to convey the land he was entitled to receive to Brown; would counsel, or any court, maintain that Jones had violated the provision against the assignment of the scrip, and that he must go through the senseless proceeding of cancelling the contract with Brown, receive his title from the government after the cancellation, and then again convey to Brown?

If Jones had attempted to assign to Brown the

right to receive the title direct, or if, after Jones had agreed to convey to Brown, the latter had demanded the title in his own name, the government, under these circumstances, could refuse to convey to Brown, because it could say, we have, by our contract with Jones, refused to recognize his right to assign to anyone alse the right to receive the title. But it could not, and would not, refuse to convey to Jones *because Jones had already agreed to convey to Brown.*

What is the difference in principle between the illustration given and the facts under consideration in the case at bar?

The Sioux half-breeds were in possession of the Lake Pepin reservation under a grant from the the Sioux nation of Indians, which grant had been recognized by the government in the treaty of Prairie du Chien, entered into in 1830. These half-breeds, under the terms of this treaty, had gone upon this reservation and resided there for twenty-five years. At the end of that period, the government, desiring to obtain the reservation and throw it open to public settlement, entered into an agreement with these half-breeds, whereby it agreed, "in exchange" for the reservation, to convey to each half-breed, *in severalty and in fee,* an amount of land equal to his proportional part of the reservation, and to be selected, not by the government, but by himself.

These half-breeds were so numerous, and their range of choice of lands was so wide, that it was impracticable to convey to each one the land he was

entitled to receive at the same time that the half-breeds conveyed the reservation to the government. And so, *as a mere method of convenience in transferring the title, and for no other purpose,* the government, in order to identify the half-breeds and to inform the land officials who was entitled to receive land, under the act, and the amount each was to receive, issued certificates or scrip, the only limitation in the entire act being, that the *scrip itself* should not be assignable.

Now, what is there in these facts to compel any different construction of the language of the Act of 1854, than to the same identical language we used in the illustration of Jones and Brown?

We contend, therefore, that the language of the act, construed as it stands according to the fair import of the words used, accomplishes a lawful purpose in preventing the scripee from assigning to another his right to receive the title.

Whether this purpose was of sufficient importance is a question for the legislature and not for the courts. The courts cannot, by interpretation overturn an act, simply because, in the judgment of the court, there were other and greater objects that might have been accomplished.

But a further examination of the question will show that the reasons for the interpretation that we contend for are by no means insignificant.

If the statute had not contained this provision the scripee could have assigned his rights to the scrip itself. His assignee in turn could have assigned it and so it could have gone on indefinitely.

The scrip, under these circumstances, would have practically been a negotiable order for title to so many acres of land, and, when it finally came into the hands of the government for redemption, after having passed through numerous persons, the responsibility of determining as to which was the legal owner and entitled to locate it and receive the title to the land, would have devolved upon the government officials. This would have involved a great amount of unnecessary work and inconvenience to the Department.

But, aside from the mere question of inconvenience, if assignments of the scrip had been permitted, the government might, under certain circumstances, have become liable to redeem the scrip more than once.

If assignments had not been prohibited a scripee could have taken a piece of scrip and written on the back thereof, "I hereby assign all my right, title and interest in the within scrip to John Smith and authorize the government to issue the title to him."

Suppose a piece of scrip had been stolen and an assignment forged, but the officials had not discovered the fraud but had treated the assignment as genuine and had issued the title to the forger, and he in turn had transferred the land to an innocent purchaser. Under such circumstances the government would have been defrauded; for, as it had permitted assignments of the scrip, it undertook the responsibility of seeing that the title was issued to the proper party, and upon a showing

by the scripee that the scrip had been stolen and the assignment forged, the governmnt would be compelled to give the scripee an equal amount of land, and thus redeem the scrip a second time.

On the other hand, under the law as it actually stands, no such situation could ever arise. For, no matter who brought the scrip to the land office, no matter whether the scrip had been stolen or not, no matter whether the land had been sold or not, the government always issued the title to the scripee, and consequently neither the government or the scripee could be defrauded.

The reasons that we assign are not merely fanciful, for the actual experience of the Department with scrip, where assignment have been permitted, shows that great inconvenience has resulted, and that the government has at times been protected from attempted frauds by this very provision of the Act of 1854.

In the case of Lettrius Alrio, 3 L. D. 44, the application to locate Indemnity Scrip was denied, because there appeared to be certain defects in the "chain of title." The decision says:

> "For these reasons the chain of title from the original confirmee to the person or persons applying for the indemnity, must be established to the satisfaction of this office before the scrip will be issued and delivered."

In 1 L. D., on pages 300, 301 and 302, will be found reported six cases, in all of which the scrip had to be returned for correction because of some

defect in the assignments. Four of these decisions were rendered between July 17th and July 25, 1882. If that number of mistakes could occur within a week, it can easily be imagined what inconvenience the Department is put to by this method of handling scrip; where assignments are permitted, every time a piece of scrip is presented the officers have to examine the chain of title as carefully as one would an abstract to a piece of real estate.

But the inconvenience is not the controlling consideration. Why are the officials so careful in examining these "chains of title?" It is because they recognize the fact that if they should make a mistake and issue the title to the wrong person, the government would have to redeem the scrip a second time. Numerous other cases might be cited showing the evils that follow where assignments of scrip are permitted, but the ones cited illustrate the principle as well as a hundred.

We now desire to call the attention of the court to the case of Walter Bourke, 12 L. D., 106, which illustrates how the prohibition against the assignment of scrip, in the Act of 1854, operates to prevent the possibility of frauds either upon the scripee or the government.

The facts in the case were that Wallace had purchased the land the half-breed, Bourke, was entitled to, and had obtained the scrip and usual power of attorney to locate it. Afterwards the half-breed sold the land to one, Henry F. Wells, and delivered to him also a power of attorney to locate the scrip. Wells, then, upon making affi-

davit that the original scrip had been lost, induced the Department to issue to him a duplicate piece of scrip and he located this duplicate scrip on a certain piece of land in the name of Bourke.

Thereafter, Wallace came forward with the original scrip and offered to locate it in the name of Bourke. The offer was refused because the records showed that a duplicate of said scrip had already been located by Henry F. Wells as attorney in fact for Bourke.

Wallace offered to show that the original scrip had never been lost, and that the duplicate had been obtained by fraud and false affidavits.

But the Secretary replied:

> "Admitting the truth of these charges, it does not affect the question now presented by this application which is, whether a *second location* of scrip will be allowed in favor of a scripee while the records show that the title is outsanding in him for another tract of land located for him on the same scrip. If the facts are true as alleged by the applicant, *the courts are open for his relief.*" (Italics our own.)

In other words, the Secretary practically said to Wallace, all the government contracted to do was to issue the title to Bourke; it has done so, and it is immaterial whether he obtained his title under the original or duplicate scrip; the government has not been injured by the fraud which you allege has been committed for it has cancelled its obligation to the scripee; Bourke has not been affected by it for he has received his title to the land

and has not made any complaint; if, as you claim, Bourke sold the land to you and not to Wells, and the latter procured the location of the duplicate scrip through fraud and false affidavits, that is a matter between you and Wells, but it is no concern of the land officials; the land department was not established to settle disputes between individuals over the title to land, "the courts are open to you for your relief."

Suppose, however, that the Act of 1854, had permitted assignments, and that Wells, instead of producing false affidavits, had secured the location of the scrip by means of a forged assignment, and then had conveyed the land to an innocent purchaser, and, thereafter, the real owner of the scrip had proven the fraud; in such a case as this, the government would have been compelled to redeem the scrip a second time.

Again, if assignments had been permitted, and someone had, by false and fraudulent representations induced a scripee to execute an assignment, and the scrip had been located under such an assignment, and the land transferred to an innocent purchaser, the scripee would have been defrauded out of his land, for in such case the government would be under no obligation to give the scripee another piece of land.

But, under the law as it exists, neither of the events mentioned above can happen, for no matter who brings the scrip to the land office, no matter whether there has been an attempted assignment or not, the government always issues the title to the

scripee and to no one else. Thus the government is always assured of redeeming the scrip upon a single location, and every scripee is assured of receiving the title to an amount of land specified in the scrip.

We certainly have shown, then, that the clause of the act, prohibiting assignments of the scrip, when interpreted according to the fair import of the language as it stands, operates to accomplish a lawful, sensible and important purpose; for it saves the department great inconvenience, prevents the *possibility* of frauds being committed against the government, through the location of the scrip, and asures the scripee of the certainty of receiving his title, under any and all circumstances.

If this be so, what right has a court, under the authorities, to substitute its judgment for that of congress and declare that there was some other and greater object that might and ought to have been accomplished? And, if a prohibition against the assignment of the *scrip itself*, will accomplish any lawful purpose, what power has a court to assume, infer or argue that congress, when it prohibited assignments of the scrip, intended to prohibit conveyances of the land, prior to the location of the scrip?

But counsel says, in numerous other laws congress has permitted assignments of scrip and issued the title direct to the assignee, and therefore, it is unreasonable to suppose that the purpose congress had in view in the Act of 1854 was to prevent

the assignee from obtaining the title in his own name.

It does not follow that because one congress had at one time adopted a certain remedy for one law, that another congress would not adopt another remedy for another law.

From time immemorial, legislatures have been experimenting with remedial laws. And it is not infrequent to find that the legislature of the same state has adopted a remedy, afterwards repealed it, and then re-adopted it.

But all the force is taken out of counsel's argument by the fact that congress itself has made just such changes in the pre-emption law; prohibiting at one time the entryman from assigning to another the right to receive the title from the government, later permitting him to assign the right so that the patent might issue in the name of the assignee, and still later, again prohibiting the entryman from assigning the right to receive the title in the name of the assignee.

The Pre-emption Act of 1830 prohibited assignments of the pre-emption right and required the title to be issued to the pre-emptor himself. The Act of 1832 repealed this provision and provided that pre-emptors might "assign and transfer their certificate of purchase, or final receipts, *and patents may issue in the name of the assignee.*" (Italics our own.)

But in 1841, this latter provision was in turn

repealed and the former remedy again adopted, by providing that,

> "All assignments and transfers of the right of pre-emption given by this act, prior to the issuance of the patent, shall be null and void."

Now, if congress at one time permitted *pre-emptors* to assign their right to receive the title to another, and at another time prohibited it, why is it so unreasonable, as counsel asserts, to suppose that one congress would permit *scripees* to assign to another their right to receive the title, and that another congress would prohibit it?

We now desire to call the attention of the court to an argument designed to show that the very purpose of the enactment of that clause of the pre-emption Act of 1841, which we have heretofore quoted, was simply to prevent the pre-emptor from assigning to another the right to receive the title from the government, and to permit the government to deal directly with the pre-emptor, and not with his assignees, in regard to the title.

If we can establish that this was the purpose of this prohibitory clause of the pre-emption act, then it can be fairly argued that it is reasonable, or at least that it is not absurd, to suppose that congress had the same object in view in enacting the the prohibitory clause of the Act of 1854; especially as the natural interpretation of the language of the act leads to the conclusion, that it was the

assignment of the scrip itself, and not the conveyance of the land, that was to be prohibited.

As proof of the fact that the object of this clause of the pre-emption act was merely to prevent the pre-emptor from assigning to another the right to receive the title from the government, we call attention to the provisions of the act itself.

Sec. 2262 of the Revised Statutes provides that pre-emptors shall not,

> "Directly or indirectly, make any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself."

Section 2263 of the same act provides:

> "And all assignments and transfers of the right hereby secured, prior to the issuance of the patent, shall be null and void."

Now, it cannot be said that the purpose of the latter provision was to prevent the conveyance of the land, for Sec. 2262 specifically prohibits all conveyances, or contracts to convey, and it would be absurd to claim that congress enacted two sections, the one directly following the other, to accomplish the same purpose.

As the purpose of Sec. 2262 was to prevent conveyances of the land, the purpose of Sec. 2263 must have been simply to prevent the pre-emptor from

assigning to another the right to receive the patent in the name of the assignee.

This position is also borne out by the following cases:

Camp vs. Smith, 2 Minn., 131.
Myers vs. Croft, 80 U. S., 291.
Book 20, L. Ed., 562.

In the case of Camp vs. Smith, a pre-emptor had sold his land after the entry, but "prior to the issuance of the patent." After the patent had issued the pre-emptor conveyed the land to another person, and, thereupon, a contest arose between the two grantees, the later grantee contending that the convyance to the first grantee was void as being in violation of that clause of the act which prohibited all assignments and transfers "prior to the issuance of the patent."

But the court held that the purpose of this provision was merely to permit the government to deal directly with the pre-emptor, in regard to the title, and not with his assignees.

At the bottom of page 138, the court says:

> "It is, however, contended by the counsel for defendant, that it was the intention of congress not only to prohibit the assignment or transfer of the *right* of pre-emption strictly so called, but also of the sale of the *land itself* or the interest therein, which the pre-emptor obtained by virtue of his purchase."
>
> "We do not think that the act referred to, sustains the position assumed. It shows, rather, that in the opinion of congress, the inhibi-

tion, if it extended to anything other than the transfer of the mere personal privilege of becoming the exclusive purchaser, was intended only to prevent the pre-emptor from assigning his certificate of purchase, *so as to enable the assignee to obtain a patent in his own name.*"

Again, on page 140, the Court says:

"Congress, therefore, determined that in all entries by pre-emption the patent shall issue to the pre-emptor only. *This relieves the department from all responsibility*, and renders the duties of officers, in this particular, plain and simple."

Again, on page 145, the Court says:

"We hold, therefore, that the prohibition contained in section twelve of the Act of September 4, 1841, is intended *only* to prevent the transfer of the mere right of pre-emption prior to the time of the entry, and the assignment of the certificate of purchase in such manner as to enable the assignee to secure the patent in his own name." (Italics in above quotations our own.)

This clause of the pre-emption act was under consideration in the case of Myers vs. Croft, *supra*.

In the course of the decision the court says:

"The inquiry is: What did the legislature intend by this prohibition? Did it mean to disqualify the pre-emptor who had entered the land from selling it at all until he had obtain-

ed his patent, or did the disability extend only to the pre-emption *right?* Looking at the language employed, as well as the policy of congress on the subject, it would seem that the interdiction was intended to apply to the *right* secured by the act, and did not go further."

According to these cases, then, congress deliberately incorporated this prohibitory clause in the pre-emption act for the very *purpose,* to use the language of the court in Camp vs. Smith, of preventing the assignee from obtaining the patent in his own name.

If congress regarded this as a legitimate object of legislation in one act, it is just as reasonable to argue that congress intended to accomplish the same purpose in another act. And as the interpretation of the language of the Act of 1854, according to the natural meaning of the words, operates to accomplish this lawful purpose, then, under the authorities which we cited at the beginning of our argument on this point, it is not within the province of the courts to say that congress intended to accomplish some other purpose, even though the other purpose is considered by the court of greater importance.

There is another argument to be drawn from the cases of Camp vs. Smith and Myers vs. Croft, which is applicable to the case at bar.

In both of these cases it was contended that the language of the pre-emption act, prohibiting assignments of the pre-emption *right,* was intended

to prohibit the conveyance of the *land,* prior to the issuance of the patent, just as it is contended in the case at bar, that the language prohibiting assignments of the *scrip* was intended to prevent conveyances of the *land,* prior to the location of the scrip.

But the courts in those cases held, as a matter of substantive law, that there is a plain and well recognized distinction between a prohibition against the assignment of a *right* to land, and a prohibition against the conveyance of the *land itself;* and further held, as a rule of construction, that the courts will never assume that the legislature has intended to prohibit the alienation of land, unless the prohibition runs directly against the land itself, or unless the language used would not bear any other interpretation.

In Camp vs. Smith, *supra,* on page 140, the court says:

> "Had it been intended to prohibit the sale of the land, or the interest acquired by the purchaser, the language used would have been adapted to the object to be accomplished. We find in other instances, where it is sought to restrain the transfer of the land, that the language is plain and *admits of but one interpretation.* The act entitled 'An Act to Increase the Present Military Establishment of the United States, and for Other Purposes,' passed July 5, 1838, provides in section 29, that certain soldiers shall be entitled to one hundred and sixty acres of land, 'which *land* shall be patented to the soldier or his heirs, and be not assignable until patented.' U. S. St. Vol. 5, 260. Here the intention to prohibit the transfer of the *land* is clearly expressed. Again,

> the 'Act entitled an Act to Provide for the Armed Occupation and Settlement of the Unsettled part of the Peninsula of East Florida,' passed August 4, 1842, gave to each settler the right to 160 acres of land, and also provided in section 4, 'that all sales, gifts, etc., of the land acquired thereby, made at any time before the issuing of the patent, shall be null and void.' U. S. St. Vol. 5, 503. Here again we find the term 'land' made use of: *and for the reason that it is about the only word that would express the idea intended to be conveyed.* How natural and appropriate it would have been to have said in the Act of September 4, 1841, that 'all assignments and transfers of the *land* prior to the issuing of the patent shall be null and void,' had that been the intention." (Italics our own.)

Paraphrasing the language of the court, how natural and appropriate it would have been to have said in the Act of 1854, that "all assignments and transfers of the *land,* prior to the location of the scrip, shall be null and void," had that been the intention.

In the case of Myers vs. Croft, supra, the court says:

> "If it had been the purpose of congress to attain the object contended for it would have declared the *lands themselves unalienable.*" (Italics our own.)

Furthermore, there were much stronger reasons for holding that the prohibitory clause of the pre-emption act was intended to prohibit convey-

ances of the land, prior to the issuance of the patent, than for holding that the prohibitory clause of the Act of 1854 was intended to prohibit conveyances of the land, prior to the location of the scrip. For, as we have shown heretofore, there were certain acts of personal service required of the pre-emptor as a condition precedent to his right to obtain the land, and he was temporarily prohibited from conveying his land to secure the performance of these acts.

And even after he had made final proof, and before the issuance of the patent, the law invested the Department with the power to cancel his entry if it should discover that he had not complied with the law in all respects, but had obtained his final receipt upon perjured testimony.

It might very well have been said, then, that there was good reason why congress should have prohibited the pre-emptor from conveying his land until the last step had been taken by the Department and it had dispossessed itself of jurisdiction by issuing the patent, because if he were allowed to sell his land before that time it might afterwards be discovered that the entry would have to be cancelled for fraud, notwithstanding that he had in the meantime sold his land to an innocent purchaser, in fact.

But no such reasons are applicable to these half-breeds. No personal acts of service were required of them, and the only condition precedent to be performed by them in order to entitle them to receive their lands was to convey their interest in

the reservation to the government. But this they had already done before the scrip was delivered to them.

The fundamental fallacy of the Secretary's position lies in his assumption that there is no distinction between a prohibition against the assignment of a right to land, and a prohibition against the transfer of the land itself.

The act says to the half-breed "thou shall not assign scrip." The Secretary asserts that this means, "thou shall not convey land, prior to the location of the scrip." In other words, that the prohibition against the assignment of scrip is equivalent, in law, to a prohibition against the conveyance of land. And counsel agrees with him, for on page 95 of his brief in the court below he says:

> "It seems absurd to say that you can sell the right itself, and not the evidence of the right, for the one logically goes with the other."

It may seem absurd to counsel, but that is just exactly what the courts decided could be done in the case of Camp vs. Smith, *supra,* and Myers vs. Croft, *supra.* In both of these cases the court distinctly decided that the pre-emptor could not assign his pre-emption *right,* and just as distinctly decided that he could sell his *land.*

Nor is the pre-emption act the only instance in which congress has recognized the principle that there is a distinction between a prohibition against

the assignment of a right to land, and a prohibition against the transfer of the land itself.

It is provided by Sec. 3, Chap. 316, 29 St., 246,

> "That the *right* of homestead entry conferred by the provisions of this act shall not be assignable, *and* no conveyance, sale or transfer of the *land* so entered shall be held valid or of any effect if made before patent has issued." (Italics our own.)

It will be noted that in this act, as in the preemption act, congress prohibited not only the assignment of the *right*, but also, and in addition, prohibited a transfer of the *land*.

But if, as counsel and the Secretary contend, a prohibition against the assignment of the right is equivalent to and will operate to prevent a transfer of the land, why was congress so careful in each one of these acts to provide that neither could the right be assigned or the land transferred?

It is perfectly manifest that congress clearly recognized that there was a distinction between the two and that a prohibition against the assignment of the right would not prevent a transfer of the land.

Whatever other differences counsel may be able to discover between the cases of Camp vs. Smith and Myers vs. Croft, and the case at bar, it is beyond dispute that the courts in these cases declared, as an abstract proposition, that there is a plain and well recognized distinction between a prohibition against the assignment of a right to

land and a prohibition against the transfer of the land itself.

We now desire briefly to call the attention of the court to a case in which that distinction is made even plainer than in the two cases cited above; the case of Dole vs. Wilson, 20 Minn., 308.

In this case certain Chippewa half-breed scrip, twenty-eight pieces, were sold to one, Wilson, and at the time of the sale and delivery of the scrip, but before its location, the half-breeds agreed to convey to Wilson the land to be located under the scrip.

This scrip was unassignable, the same as Sioux half-breed scrip, and had to be located in the name of the scripees.

The transaction was attacked on identically the same grounds as in the Stram case, that the agreement to convey the lands was in violation of the law prohibiting the assignment of the scrip.

But the court held that while the scrip was not assignable, the land was transferable.

On page 311, the court says:

> "The privilege of each half-breed to select 80 acres of land was a personal right, and therefore the scrip, issued as the evidence of the right, was non-assignable. And it was accordingly held by the general land office that transfers of the scrip were void, and that a certificate could only be located in the *name* of the half-breed in whose favor it was issued."

Here is a direct decision that the scrip itself is not assignable.

On page 312, the court says:

> "As to the agreements to convey, they are certainly per se unobjectionable. The treaty not only contains no prohibition of such conveyance, but expressly provides that the lands are to be secured to the half-breeds by patents in the usual form, i. e., in the form in which patents are made to any ordinary purchaser of public lands, without restraint upon the power of alienation."

In this case, then, it is distinctly decided that the *scrip* is not assignable, and is just as distinctly decided that the *land*, taken under the scrip, is transferable, notwithstanding the prohibition against the assignment of the scrip.

How, then, can it be contended by the Secretary and counsel that a prohibition against the assignment of scrip is equivalent, in law, to a prohibition against the conveyance of land?

The decisions of Camp vs. Smith, Myers vs. Croft and Dole vs. Wilson, then, settle two questions that are involved in the case at bar.

1. That there is a plain and well recognized distinction between a prohibition against the assignment of a *right* to land, and a prohibition against the transfer of the *land itself*.

If this be so, it does not follow, as the Secretary and counsel assume, that when congress prohibited the assignment of scrip it intended to prohibit conveyances of the land.

2. That, as a rule of construction, the courts

will never assume that the legislature has intended to prohibit the alienation of land, unless the prohibition runs directly against the land itself, or unless the language used would not bear any other interpretation.

If this is a true rule of construction, as is declared by these courts, then it cannot be held that the prohibitory clause of the Act of 1854 was intended to prohibit conveyances of the land, because the prohibtion does not run against the land but against the scrip, and, secondly, because language prohibiting the assignment of scrip is capable of a sensible, reasonable and natural interpretation, without holding that it was intended to prevent conveyances of the land.

The construction contended for by the Secretary and counsel makes the prohibitory clause of the Act of 1854 operate as a restriction upon the right of the scripees to alienate their lands. We have already discussed certain phases of this question of restrictions upon the right of alienation, and now desire to examine it more at length, and as a substantive proposition of law.

THE RIGHT OF ALIENATION.

The right of alienation has not always existed. The inalienability of lands was the cornerstone of the feudal system, and even a free man could not alienate his lands until about the year 1290.

This right was not obtained until after centuries of contest with the feudal lords, as we are told

in Washburn on Real Property, (4th Ed.) on pages 78, 79 and 80, where will be found a concise history of the growth of this right.

But this right once having been obtained has never been surrendered. The right has always existed in this country, and is highly favored both by courts and legislatures. In this age, land is almost as much the subject of exchange as personal property. Modern commerce, trade and civilization could never have reached its present state of development, if the old barriers preventing the transfer of lands had not been torn down.

We do not mean to argue from this that congress has no *power* to restrict the alienation of lands. But we do contend, that because of this general tendency to enlarge, rather than to restrict this right, that it is fair to infer that the power has not been exercised except for good and sufficient reasons.

We also contend, that because of this general tendency, and by reason of the high favor in which this right is held, that the courts will assume that the legislature has not intended to interfere with the right of alienation, unless it be by the use of language so clear and explicit that there can be no possible doubt as to its meaning.

The following are a few of the cases that uphold this doctrine:

Knight vs. Leary, 54 Wis., 459.
Webster vs. Luther, 50 Minn., 77.
Camp vs. Smith, 2 Minn., 131.
Webster vs. Luther, 163 U. S., 331.

In Knight vs. Leary, the Court says:

"We are unable to concur in these views. Without entering into an extended discussion of the subject, it is sufficient to say that the law does not favor restraints upon alienation *and nothing short of a positive provision to that effect* will justify a court in holding that a statute imposes such restraints." (Italics our own.)

In Camp vs. Smith, the court says:

"Land in the United States is as much the subject of traffic almost as merchandise, and that trade is rather encouraged than restricted by law.

"On grounds of public policy, therefore, such an interpretation should be given to the pre-emption law as will not interfere with the free transfer of land in the state; and to that end it should, if necessary, be strictly construed, so as to not prohibit the assignment or transfer of anything not specifically and unmistakably designated."

And the Supreme Court of the United States in the case of Webster vs. Luther, *supra*, says: "On the other hand, the general rule of law discourages all restraints upon alienation."

Having shown what the policy of the courts is in regard to restrictions upon the right of alienation as affecting citizens, we now propose to examine that question with reference to its bearing on half-breeds and Indians.

Wherever Grants Have Been Made to Indians They Have Been Held by the Courts to Be Free from Restrictions, Unless the Intent to Restrict Is Clearly Expressed.

In the court below, counsel expended much time and cited many cases to show that the policy of the government has always been to treat Indians as wards of the nation, and to place restrictions upon their right to convey lands granted to them.

Starting with this as a premise, counsel has reasoned, by analogy, that congress intended to prohibit the Sioux half-breeds from conveying their lands, until after the location of the scrip.

The position of the defendants on this question is, that while this has been the general policy of the government, yet the instances where Indians have been allowed to convey, free from all restrictions, are numerous, and that in construing grants to Indians the courts have adopted the same rules of construction as in cases of grants to citizens, and have held such grants free from restrictions, unless the intent to restrict is clear and apparent.

We have already cited several treaties where unconditional grants were made both to half-breeds and full bloods. We now call attention to the following cases in which courts have decided that no restrictions were imposed, and we shall attempt to show, that in reason and on construction of the language used, there is less cause for holding that

restrictions on the right to convey were intended in the Act of 1854, than in the cases cited:

Hartman vs. Warren, 19 L. D., 65.
Hartman vs. Warren, 76 Fed. Rep., 157.
Dole vs. Wilson, 20 Minn., 308.
Doe vs. Wilson, 64 U. S., 457.
Book 16, Lawyers Ed., 91.
Crews vs. Burcham, 66 U. S., 352.
Book 17, Lawyers Ed., 91.
Jones vs. Meehan, 175 U. S., 1.
Book 44, Lawyers Ed., 49.

The case of Hartman vs. Warren arose on a construction of the seventh sub-division of Art. 2 of a treaty with the Chippewas, 10 St. at Large, 1109, which provides:

> 7th. "Each head of a family or single person over 21 years of age at the present time of the mixed bloods, belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, *to be selected by them under the direction of the President,* and which shall be secured to them by patent in the usual form." (Italics our own.)

As a means of identifying these half-breeds, scrip was issued, as in the case of the Sioux half-breeds, which scrip was in the following form, to-wit:

Department of the Interior,

Office of Indian Affairs, ...186

I hereby certify that .....of .....,in the state of .....,
is one of the persons described in the provisions contained in the treaty of September 30, 1854, with the Chippewas of Lake Superior, and that the said ..... is entitled to eighty acres of land as therein provided.

It is hereby expressly declared that any sale, transfer, mortgage, assignment, or pledge of this certificate, *or any right accruing under it*, will not be recognized as valid by the United States; and that the patent of lands located by virtue thereof *shall be issued directly to the above named reservee, or his or her heirs, and shall in nowise inure to the benefit of any other person or persons;* and that the object and purpose of this certificate is to *identify* the said above named..... as one of the persons entitled to the benefits of the provisions of the seventh clause of the second article of the treaty aforesaid.

Given under my hand and seal of the Department of the Interior, this day and year first above written.

.....

Commisioner.

(Italics our own.)

The practice of handling the scrip and disposing of the lands by powers of attorney, one to locate the scrip in the name of the half-breed, and the other to sell the land when located, the same as was done with the Sioux half-breed scrip, was soon adopted.

Warren, a Chippewa half-breed, used his scrip in this way, and it was located on a part of Section 30, the same section that is in controversy in the case at bar.

The transaction was attacked on the same grounds as was the arrangement between Stram and Eaton. We quote a part of the fourth ground of contest as it appears on page 65, 19 L. D:

> "4th. That prior to the time of said attempted location, said James H. Warren, for a valuable consideration to him paid, parted with said certificate of scrip, and in order to effectuate the bargain and sale made by him, and to evade the express prohibition of the law and to permit his vendees to accomplish by circumlocution and subterfuge, a fraud and imposition upon the officers of the law, had signed and acknowledged certain powers of attorney, one to locate the land, and the other to sell the same after its location."

Here was a direct attack upon the right of the half-breed to sell his land prior to the location of the scrip, but Secretary Smith held the location good, and that Warren had a right to dispose of his land in this way.

The case was carried into the courts and the decision will be found in the 76 Fed. Rep., 157.

In the statement of facts, on page 158, the court says: Hartman made application to contest on the ground that the entry of Warren *was not made by or for him, and that he has unlawfully parted with his scrip before the entry was made.* And a little later on the court says, that for the purposes of the case we will concede this to be the legal effect of the averments of the bill.

The decision sustained the ruling made by the Secretary.

The case of Dole vs. Wilson, 20 Minn., 308, involved the construction of this same clause of the treaty with the Chippewas.

The facts were that Dole had sold to Wilson 28 pieces of this scrip and delivered the same to the purchaser, and each piece of scrip was accompanied by a contract made by each half-breed in which the latter agreed to convey the land to be located under the scrip.

It was contended that the transaction was illegal. The court held that the *scrip itself* was unassignable, "and that a certificate could only be located in the *name* of the half-breed in whose favor it was issued." But the court further held that the agreements to convey the land were valid.

In these Chippewa half-breed cases, the courts, then, have held that agreements to convey the land, made prior to the location of the scrip, are valid, notwithstanding the prohibition against the assignment or sale of the scrip.

But counsel says, there was no prohibition against the sale of the land in the treaty with the Chippewas, and, therefore, the above cases are not in point. Neither was there any prohibition against the sale of the land in the Act of 1854, except on the assumption that the prohibition against the assignment of the scrip was intended to prevent the sale of the land.

Counsel makes one further distinction and that is, that the Act of 1854 itself prohibits assignments of the scrip while the treaty does not, the prohibition against the assignment of the scrip having been made by the executive department.

We shall now attempt to show that the treaty is to be construed just as though it contained the language prohibiting assignments of the scrip.

The treaty provides that the half-breeds "shall be entitled to eighty acres of land, to be selected by them, *under the direction of the President.*"

This clause, "under the direction of the President," conferred upon the executive department the authority to determine the manner and method of transferring the title to these half-breds.

The executive department, in pursuance of the authority conferred upon it by the treaty itself, provided that scrip should issue and that no "sale, assignment or pledge" of said scrip should be valid. That the executive department did this is manifest from a quotation which we make from Hartman vs. Warren, 19 L. D., page 71:

"March 12th, 1856, the Commissioner of

Indian Affairs, in a letter to the Secretary, recommended the issue of scrip *as the most practicable method of disposing of the half-breed claims* and enclosed a form of certificate which was approved by the Secretary." (Italics our own.)

The treaty itself, then, conferred upon the executive department the authority to determine the method of transferring the title to the half-breeds. The Department, in the exercise of this authority, provided that scrip should issue and that it should not be assignable. The treaty, therefore, is to be construed just as though it contained the language prohibiting the assignment of the scrip.

We contend that there is no substantial difference in the two cases; and that the attempt to place one construction upon the act, and another upon the treaty, simply because in one the legislature prescribed the method of transferring the title, and in the other the executive department, in pursuance of authority conferred upon it, did so, is to make a distinction without a difference, and invokes a forced, unnatural and unreasonable rule of construction.

It is evident from the language of the circular authorizing the issue of the scrip, and from the language of the scrip itself, that the scrip was provided for merely for the purpose of "identifying" the half-breeds and as a mere method of convenience to be used in transferring the title from the

government to the half-breeds, and not for the purpose of preventing a conveyance of the land.

The act was passed in July, 1854, and the treaty was negotiated in September, 1854, and they were administered contemporaneously; and the presumption is that the purpose in providing for the issue of scrip was the same in both cases.

In 1832, the government negotiated a treaty with the Potowotomies, 7 St. at Large, 399, and among others granted two sections of land, without specifying where they were located, to Petchico.

Article 3 of the treaty provided:

> "The foregoing reservations shall be selected, *under the direction of the President of the United States, after the lands shall have been surveyed,* and the boundaries to correspond with the public surveys." (Italics our own.)

Petchico conveyed his lands before they were surveyed and before any selection had been made, dscribing them in the deed merely as the lands he was entitled to under the treaty.

After the survey and selection, the plaintiff

> "Took a deed from Petchico's heirs, dated in 1855, on the assumption that their ancestor's deed was void, he having died in 1833, *before the lands were surveyed or the reserved sections selected.* And on the trial below, the court was asked to instruct the jury 'that Petchico held no interest under the treaty in the lands in question, up to the time of his death, that was assignable, he having *died before the*

location of the land, and before the patents issued.'" (Italics our own.)

The lower court refused to give the instruction, and held that Petchico had a perfect right to sell his land, *before the location,* and that the title vested in his grantees when the selection was made.

The decision was affirmed by the Supreme Court in the case of Doe vs. Wilson, *supra,* and in the course of the decision the court says:

> "Although the government alone can purchase lands from an Indian nation, it does not follow, that when the rights of the nation are extinguished, an individual of the nation who takes as private owner cannot sell his interest. The Indian title is property, and alienable unless the treaty had prohibited its sale."

The doctrine laid down in the above case was reaffirmed in Crews vs. Burcham, *supra.* In the latter case the court says:

> "It is true that no title to the particular lands in question could vest in the reservee, or in his grantee, until the location by the President, and, perhaps, the issuing of the patent; but the obligation to make the selection as soon as the lands were surveyed, and to issue the patent, is absolute and imperative, and founded upon a valuable and meritorious consideration. The land reserved constituted a part of the compensation received by the Potowotomies for the relinquishment of their right of occupancy to the government. The agreement was one,

which, if entered into by an individual, a court of chancery would have enforced by compelling the selection of the lands and the conveyance in favor of the reservee, or in case he had parted with his interest, in favor of his grantees. And the obligation is not the less imperative and binding, because entered into by the government. *The equitable right, therefore, to the lands in the grantee of Besion, when selected, was perfect;* and the only objection of any plausibility is the technical one as to the vesting of the legal title." (Italics our own.)

It will be noticed that this treaty, like the treaty with the Chippewa half-breeds, contained the provision that the lands should be selected "under the direction of the President." But we have already discussed this point and will not repeat the argument.

In addition, the latter treaty provided that the selections should be made "after the lands shall have been surveyed," and one of the points raised in Doe vs. Wilson, *supra,* was, that the deed was void because "Petchico held no interest under the treaty in the lands in question, up to the time of his death that was assignable, he having died *before the location of the land."* (Italics our own.)

Evidently, this argument did not commend itself to the court.

The case of Jones vs. Meehan, *supra,* involved the construction of Art. 9 of the treaty of the Red Lake and Pembina bands of Chippewa Indians. This article provided:

"Upon the urgent request of the Indians,

parties to this treaty, there shall be set apart from the tract hereby ceded a reservation of six hundred and forty acres near the mouth of Thief River for the Chief Moose Dung."

Some years later the chief died, and his only surviving heir, Moose Dung the younger, in 1891, made a lease of a part of the premises selected by his father to the plaintiff.

In 1894, he made a lease of the entire premises to the defendants, and the latter, assuming that the Indian had received no such title under the treaty as would enable him to make a conveyance in his own right, obtained the passage of a joint resolution authorizing the Secretary, in his discretion, to approve the lease to the defendants. The Secretary, after making certain changes in the terms of the lease, approved it.

Thereupon, the plaintiffs, commenced an action against the defendants to quiet title, claiming that Moose Dung was vested with a fee simple title by the terms of the treaty and that the lease made to them was valid.

The question to be decided is stated by the court to be as follows:

"The fundamental question in the case is, what was the nature of the title which the elder Chief Moose Dung took under the treaty of October 2, 1863, between the United States and the Red Lake and Pembina bands of Chippewa Indians? Was it a mere right of occupancy, with no power to convey the land except to the United States, or by their con-

sent? Or was it substantially a title in fee simple with full power of alienation?"

The circuit court held that the reservation in the treaty to the elder Moose Dung was in the nature of a grant of title to him, burdened with no restriction or condition, and that the lease to the defendants, though approved by the Secretary under the act of congress, was of no validity as against the prior lease made to the plaintiffs. This decision was affirmed by the Supreme Court.

It will be noticed that the terms of the grant, "there shall be *set apart,*" are not as strong as those generally used where a fee simple title is intended to be conveyed. In such cases the provision nearly always is, there is hereby "granted" or "sold" or "conveyed," or "aliened." The term "set apart for the *use* of," is the one most frequently used in Indian treaties where a mere right of occupancy is granted; and, undoubtedly, if the words "use of" had been added to the terms of the grant in this case, the Supreme Court would have decided the other way. But because of the omission of this word, and because there was no language in the treaty affirmatively prohibiting a conveyance of the land, the court held that a fee simple title was conferred with full power of alienation.

The court in this case reviews the decisions upon this question of alienation at great length and sums them up as follows:

"The clear result of this series of deci-

sions is that when the United States, in a treaty with an Indian tribe, and as a part of the consideration of the cession by the tribe of a tract of country to the United States, make a reservation to a Chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States, by a provision of the treaty, or of an act of congress, have expressly or impliedly prohibited or restricted its alienation."

In his brief in the court below, counsel attempts to make a distinction between the cases of Crews vs. Burcham, *supra*, and Jones vs. Meehan, *supra*, on the one hand, and the case at bar on the other. This alleged distinction is based on what is claimed to be a difference between the terms of the grant in the Act of 1854, and the terms of the grant in those treaties.

According to counsel, in his reply brief in the court below, page 15, the conditions which must exist in order to enable an Indian to convey lands are clearly set forth in the following language of the Supreme Court, in the case of Jones vs. Meehan, supra:

"The clear result of this series of decisions is that when the United States, in a

treaty with an Indian tribe, and as a part of the consideration for the cession of the tribe of a tract of country to the United States, make a reservation to a Chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed or located in the future, the treaty itself converts the reserved sections into individual property."

The Supreme Court in this case did *not,* as counsel assumes, decide that under no other circumstances than those mentioned could an Indian convey his lands. It had been contended that by the terms of this treaty under consideration the Indian could not convey, and the court simply decided that, when the things concurred, which they mentioned, the Indian *could* convey, and did not declare that there were no other possible conditions under which he could convey.

But be this as it may, we propose to show that, in all substantial respects, the Sioux half-breeds came fully within the conditions which counsel himself claims must exist, and that there is no fundamental difference between the treaty negotiated with them and the class of treaties referred to in the above decision.

In those treaties the government had entered into negotiations with the Indians for the surrender of their reservation. In the case of the Sioux half-breeds, the government entered into negotiations for the surrender of the Lake Pepin reservation.

In those treaties, as a consideration for the cession to the United States, a specified number of sections of land were granted to the members of the tribe. In the case of the Sioux half-breeds, as a *consideration* for the cession to the United States, an acreage equal to his interest in the reservation was granted to each half-breed.

In those treaties, the particular lands the Indian was to receive were not pointed out by the treaty. In the case of the Sioux half-breeds, the same was true and they were allowed to select lands out of the public domain.

In the cases arising under those treaties, the Indians were allowed to convey, although at the time of the conveyance they did not know what lands they were conveying and in some of the cases the lands had not even been surveyed.

The only possible distinction between the two, even in matter of detail, is that in the case of the treaties referred to the number of acres granted was specified in the treaty, while in the case of the Sioux half-breeds, by the second section of the act, this was referred to the executive department to be determined as a matter of computation after the number of half-breeds had been ascertained.

But counsel would hardly contend that this is such a distinguishing feature as to make the one estate alienable and the other not, especially as it was definitely ascertained and determined by the Department, before any of these half-breeds agreed to convey their lands, that each one was entitled to 480 acres.

This brings these Sioux half-breeds, then, within every condition mentioned by the Supreme Court in the case cited above.

Not only does the Act of 1854 meet every requirement mentioned by the court, but it contains certain additional privileges which none of those treaties referred to contain.

The Sioux half-breeds were allowed to select their own lands. The lands in the treaties referred to were required to be selected "Under the direction of the President." The Sioux half-breeds were allowed to locate on unsurveyed lands. The lands in the treaties referred to were to be selected "after the lands had been surveyed."

Do these additional privileges indicate an intention to limit and restrict the nature of the estate granted? Or, do they not rather indicate an intention to enlarge rather than to restrict the estate, and do they not indicate that congress had a greater degree of confidence in the ability of these half-breeds to take care of themselves than in ordinary cases?

Now, what is there in the Act of 1854, when compared with these treaties, to indicate that the government intended to place restrictions upon the Sioux half-breeds, and left the Chippewas and Potowotomies free from burdens and limitations? The Sioux half-breeds were permitted to take lands anywhere in the United States. Both the Chippewas and the Potowotomies were confined within comparatively narrow limits. The Sioux half-breeds were permitted to take unsurveyed lands.

The others were not permitted to make their selections until after the lands had been surveyed.

We ask the court, in all earnestness, carefully to read the Act of 1854, and the Chippewa and Potowotomie treaties, and then forgetting, so far as possible, the arguments of counsel both for plaintiffs and defendants, and applying the ordinary rules of construction and sound common sense, to say whether there is any support in reason for the contention that restriction of the right of alienation was intended in the one case and not in the other.

But there is another consideration suggested by these decisions in the Chippewa and Potowotomie cases.

In the light of these cases what becomes of counsel's theory of guardianship? It will be remembered that the only reason counsel assigned for his construction that the prohibitory clause of the act was meant to prevent the sale of the land, was that congress regarded the half-breed as incompetent to take care of his own affairs.

There is nothing in the language of the act itself, as there is in hundreds of the Indian treaties, to convey the idea of incompetency; and counsel's whole argument on this point is based on the *general* policy of the government in dealing with Indians.

In other words, he asks the court to take judicial notice of the incompetency of these half-breeds, whether the language of the act conveys that idea or not.

If this is the rule of construction to be applied in such cases, why was it not adopted by the court in the Chippewa and Potowotomie cases? There was no positive statement in either of these treaties that the Indian *should be allowed to sell his land;* there was simply an absence of restrictions on the right to sell.

But, if counsel's theory is right, why did the courts in those cases not say: This language has been used in reference to Indians; Indians are not competent, and we will, therefore, assume that the government has intended to treat them as such, and will not permit them to convey.

The government did not treat the Chippewa half-breeds as incompetents. It did not treat the full blood Potowotomies as incompetent; it did not treat the full blood Wyandotts as incompetent, for, as to part of them, it was provided, that the "patents shall contain an absolute and unconditional grant in fee simple." 10 St. 1161.

Now, if the government regarded the Chippewa half-breeds as being capable of disposing of their lands, what right has counsel to ask this court to *assume* that the Sioux half-breeds are incompetent; especially as counsel himself has furnished us with a witness who assures us that many of them "were as intelligent as their white brethren."

Again, if the government permitted the full blood Potowotomie and Wyandott Indians to dispose of their lands, without restrictions or limitations, upon what theory is this court to be asked to

indulge the presumption that these Sioux half-breeds, "many of whom are citizens of Minnesota and adjoining states, and have filled offices of honor and trust," were in need of guardianship and protection.

And, finally, we again ask, if these half-breeds needed protection the instant before the location of their scrip, why were they not just as much in need of it the instant after?

If the Secretary and counsel had taken the position that congress had intended to *perpetually* prohibit the conveyance of these lands, the argument would at least possess the merit of consistency and not fall by its own weight.

But to seriously contend that an intelligent body of men deliberately contemplated and provided that these poor, witless half-breeds should be utterly incapable of taking care of their own interests up to a certain day, and that they should then be instantly converted into intelligent beings, is a proposition that staggers human comprehension and an argument that reduces itself to an absurdity.

We desire now to call the attention of the court to another consideration which bears out our contention in regard to the prohibitory clause of this act. Counsel contends that the purpose of the prohibitory clause of this act was to prevent the conveyance of land before location of the scrip. If it can be shown that this alleged purpose was not accomplished; if it can be shown that the alleged remedy adopted was not calculated to accom-

plish any such result; if it can be shown that congress, in the exercise of ordinary intelligence, must have known that this remedy would fail to bring about such a result; and, finally, if it can be shown that there was a perfectly natural, apparent and *effective* way by which congress could have prevented the conveyance of land before location of the scrip,—if these things can be shown, then the theory of counsel stands discredited and must be rejected; for the courts will never assume that the legislature has intended to accomplish a particular purpose, and has adopted a remedy that is utterly ineffectual to bring it about.

In support of these contentions we lay down two propositions:

1. If the purpose of the law was to prevent conveyances of the land, then for a period of thirty-five years, from the passage of the Act in 1854, to the rendering of Secretary Vilas' decision in 1889, it utterly failed to accomplish this purpose, for, during this entire period, this scrip was used in identically the same manner as it was in the case of Eaton and Stram.

2. Although this law, under the Secretary's view of it, was constantly violated, the records of the land department disclose the fact, that this alleged remedy never, *in a single instance,* for this entire period of thirty-five years, operated to prevent a conveyance of land, until it became effective in 1889, in the case of Hyde vs. Eaton.

Now, what are the proofs that this scrip has been customarily handled in this way?

It appears from a printed brief of S. S. Burdett, which was used on the reargument before Secretary Noble, in the Hyde case, and which brief is on file in the department, that in his order for reargument the Secretary directed that an examination of the records be made to ascertain what the practice had been relative to the handling of this scrip. We shall attach that portion of the brief to our brief as an appendix and the court can give it such consideration as it is entitled to. Anything that was officially brought before the Secretary, when this case was being heard by him, is proper to be considered by this court, for this case is practically a review of his action.

This investigation revealed the fact that this scrip had been used in nearly every state and territory in the west, from Michigan to California.

It will hardly be presumed that these half-breeds, who did not sever their tribal relations until 1887, scattered all over this vast territory and took these lands in person.

This investigation also revealed the fact that hundreds of pieces of this scrip had been used by attorneys, and it is a well known fact, that in every land office in Minnesota, there are hundreds of pieces of this scrip that have been used by attorneys in fact.

The following decisions of the courts show that this scrip has been handled in just this way

from the latter part of the fifties down to the decision in the Eaton case, viz:

Gilbert vs. Thopson, 14 Minn., 414.
Myrick vs. Thopson, 20 Minn., 184.
Courselle vs. Weyerhauser, 69 Minn., 328.
Allen vs. Merrill, 8 L. D., 207.
Case of Walter Bourke, 12 L. D., 106.

This practice has been so long continued, so open and notorious that the courts have taken judicial notice of the fact.

Judge Moer in his memorandum in this case says:

> "It is probable that of all the scrip issued under the act, three-quarters to four-fifths of it has been handled in exactly the same way as was the particular scrip *in the case at bar.*" Record p. 277, Fol. 829.

The Supreme Court of Minnesota has taken judicial notice of this fact.

In Courselle vs. Weyerhauser, 69 Minn., 331, the court says:

> "In view of the *usual manner* of dealing with this half-breed scrip and the land entered or to be entered with it, *which are matters of common knowledge,* it is evident that the plaintiff intended to and supposed he was disposing of all his interest in the land entered with the scrip, and that he always supposed that he had done so until some undisclosed in-

fluence induced him to assert the contrary after a quarter of a century."

In the case of Felix vs. Patrick, 36 Fed. Rep. 460, the court says:

> "Knowing as we do, *how land scrip passed in the market*, the only fair understanding of the facts as disclosed by the bill is that this scrip was wrongfully obtained from Sophia Felix, and placed on the market, and that defendant seeking scrip wherewith to enter this land found and purchased this."

And the Secretary himself admits that this scrip was habitually handled in this way, for, in the case of Allen vs. Merrill, 217, he says:

> "The scrip, with these blank letters of attorney pinned to it, passes into the market, and is sold and transferred by mere delivery, as freely as a government bond."

The evidences, therefore, are more than abundant to sustain our first proposition, that for thirty-five years, under counsel's construction of the law, the law was constantly, openly and flagrantly violated.

Both counsel and the Secretary admit that this alleged remedy never operated to prevent the transfer of a single piece of land until it was made to perform that service in the case of Hyde vs. Eaton, in 1889.

Counsel, then, asks this court to hold, that

congress deliberately incorporated this prohibitory clause in the act, *for the avowed purpose of preventing conveyances of the land before location of the scrip,* when it is admitted that this alleged remedy was so utterly ineffectual to accomplish this purpose, that in a period of thirty-five years of constant, open and notorious violation of the law, it never operated, in a single instance, to accomplish the result intended.

Is this court going to hold that the congress of 1854 was so lacking in intelligence that it could only propose a remedy that would operate in this way?

But, counsel will reply, legislatures can only propose remedies, they cannot enforce them or guarantee that they will not be violated.

They can, however, propose remedies which are at least *calculated* to accomplish the desired result.

But a moment's thought, by a person of only average intelligence, would have shown that a prohibition against the assignment of scrip would not operate to prevent the conveyance of land. The Secretary himself, on page 217, in the case of Allen vs. Merrill, absolutely and conclusively proves this.

He says that the usual manner of using these powers of attorney has been to file the power authorizing the location in the land office, "not disclosing the existence of the other." He then says, "Nothing, therefore, to challenge the bona fides of the transaction then appears on the surface, nor

any reason why the land office should not recognize it as the fair exercise of the right to do by an attorney what one might lawfully do himself." After the location is made the power to convey is filed in the office of the register of deeds, and thus the conveyance is effected without the knowledge of the land officials.

The Secretary is at pains to inform us that it was the easiest thing in the world to defeat the purpose of this law. All one had to do was to obtain two powers of attorney, one to locate the scrip, the other to convey the land, and file one in the land office, *"not disclosing the existence of the other."* Then when the title had passed to the scripee under the location, the other power of attorney could be filed in the office of the register of deeds, and the conveyance of the land effected. And the Secretary informs us that there was no way to prevent this, for, when the power to locate is filed, *"nothing to challenge the bona fides of the transaction then appears on the surface."*

Now, is it to be assumed that a scheme that could be so easily worked as this, that was so manifest and transparent that it was seized upon and utilized by the general public before the ink had fairly dried upon the certificates of scrip that were issued to these half-breeds, never occurred to a single member of the congress of 1854? In reply to this counsel will doubtless say, is a law to be held invalid because it is violated? Can the legislative branch of the government prevent infractions of the law?

Legislatures cannot compel men to be virtuous, to think rightly, or prevent them from committing crimes. But there are certain legal effects and results over which legislatures have the absolute control.

We have cited numerous Indian treaties where it was provided that the Indian should never "sell his land except to the United States."

Is there any possible way in which such a provision could be violated? It might be *attempted* but it could not be *accomplished.* Again, the construction which we place on this prohibitory clause of the act, furnishes another illustration of a provision which it is absolutely impossible to defeat or evade. We say it was for the purpose of permitting the government to issue the title direct to the scripee.

There is no way to defeat this provision. If a scripee should give an assignment of the scrip itself the government would refuse to issue the title to the assignee. If a piece of scrip were stolen and a power of attorney to locate forged, the government would still issue the title to the scripee.

If congress had intended to prevent the conveyance of land before location of the scrip, there was a way in which that purpose could have been effectively accomplished. Suppose the prohibitory clause of the act, instead of reading as it does had read as follows:

Provided, however, that no transfer or conveyances of said lands, prior to the location of the scrip shall be valid and every scripee shall furnish

sworn proof that no such conveyances have been made, before the title shall issue to him?" If the law had read in this way no one would have dealt or have attempted to deal, in these lands or in this scrip. Even if there could be means devised to evade such a provision, prudent business men would not take advantage of it, for they would not risk their money in the purchase of lands where the law plainly informs them that the person with whom they would have to deal has no interest in the land which he can dispose of.

We contend that counsel's construction of the prohibitory clause of the act must, therefore, be rejected. For, upon the Secretary's own showing, the alleged remedy was not even calculated to accomplish the results claimed for it by counsel, and there was another and more natural remedy that would have accomplished such result. Such a construction is an indictment of the intelligence of congress, and the courts will not adopt an interpretation that leads to such absurd results.

In the first part of this brief, we had occasion to refer to the fact that the misapprehension of the Secretary, as to the nature and purpose of the Act of 1854, grew out of the assumption that its purpose was the same as that of the homestead and preemption acts. And, as bearing out our contention that he had misapprehended the purport of the law, we called attention to the fact that he had held, that the improvements to be placed upon unsurveyed land must be made for the personal use and benefit of the scripee, and that the land must be

taken for his personal use and benefit, and we showed that this position was untenable, for the reason that if congress had intended that the scripee should make the improvements for his own personal use, and that he should take the land for his own personal use, the act itself would have made these requirements, the same as the homestead and pre-emption acts did.

In our judgment, the construction which the Secretary placed upon the prohibitory clause of this act, that it was intended to prohibit and prevent agreements to convey the land, prior to the location of the scrip, is also due to the fact that he confounded the purpose of the Act of 1854, with that of the public land laws in general.

The Department has been so accustomed to administer laws which contain restrictions upon the right of alienation, that it has been very easy, and somewhat natural, for it to jump to the conclusion that every law which was assigned to it to administer contained such restrictions; just as Secretary Vilas did in the Soldiers Additional Homestead cases, and in which conclusions, according to the courts, he was in error.

And so Secretary Vilas, in this case, seems to have assumed that the language of the act, prohibiting assignments of the scrip, was intended to prohibit agreements to convey the land, before the location of the scrip, without stopping to seriously consider whether there were any reasons why such prohibition should be made, or whether the lang-

uage, according to the rules of statutory construction, would bear any such interpretation.

It will be noticed that there is nowhere, in his lengthy opinion, any specific reason given why congress should have prohibited the scripee from agreeing to convey his land, prior to the location of the scrip.

He starts out with it as an assumed and established fact, that the purpose of the act in prohibiting assignments of the scrip was to prevent agreements to convey, and then makes a very logical and conclusive argument to show that as this was the purpose, the execution and delivery of the two powers of attorney operated to defeat the law.

We think that an examination into the practical reasons which required the issue of the scrip, and of all the facts and circumstances surrounding its issue, will show that *the only reason why the act made any reference to scrip at all* was because it was necessary to provide for its issue *as the only means that could be employed to transfer the title to the half-breeds,* under the peculiar circumstances that existed.

The act provided that if the half-breeds would surrender their interest in the reservation the government would convey to each one, in severalty and in fee, an amount of land equal to his proportional part of the reservation, to be selected by the half-breed, out of any part of the public domain.

The statute required no act upon the part of the half-breed, such as residence upon or cultivation of the land, which necessitated any delay in

the transfer of the title from the government to the half-breed. Consequently, if each one of these half-breeds, at the time they met the government's representative and surrendered their interest in the reservation, had then desired to take the land he was entitled to, there was no reason at all why the government should not, then and there, through its agent, have given to each half-breed a deed to his land and closed the whole transaction, in the same way that individuals would have met and effected an exchange of land. If the transaction had been carried out in this way, manifestly, there would have been no necessity for the issue of scrip, and scrip would not have been mentioned in the act.

But there were certain practical difficulties in the way of this method of procedure. Each half-breed was to receive an amount of land equal to his interest in the reservation, and at the time of the pasage of the act it was not known what the amount would be, and so the second section of the act provided that the land officials should ascertain and determine the amount.

As the amount that each half-breed would be entitled to was not known at the time the contract was closed between the government and the half-breeds, and as the title could not, therefore, be conveyed to them at that time, it was necessary to devise some other means of transferring their lands to them.

Scrip, or certificates of title, were issued, therefore, in order to *identify* these half-breeds, so that the land officials in the various districts would

know who was entitled to receive land under the act, and the amount each one was entitled to.

We, contend, therefore, that the sole reason why the provision in regard to scrip was incorporated in the act, was simply to provide a method for transferring the title to the scripees, and that it was not for the purpose of preventing agreements to convey the land.

Another reason urged by counsel, in his reply brief in the court below, why the half-breed was not allowed to convey before the location, but was after the location, is that in the one case he would have something *"tangible"* to convey, "with the value of which he might be supposed to be acquainted in a much greater degree than with that of a mere commercial instrument, which might be parted with improvidently in accordance with his known traits, for a tithe of its value or a drink of whiskey or other similar consideration."

It does not seem reasonable to us that congress, in passing this act, ever took such a fine spun distinction as this into consideration. A person who did not have sense enough to know that a certificate, which called for 480 acres of land, was worth as much as the thing it called for, would not have sense enough to dispose of the land to advantage after he got it. And yet the Secretary and counsel admit the scripee could sell his land immediately after the location.

Counsel, in his brief in the court below, on the same page from which we have quoted, says that

the law contemplated a "personal selection" of the land by the scripee so that he might have knowledge of its value before he parted with it, and that this was the reason congress prohibited him from selling it before the location of the scrip.

But counsel himself admits that a scripee could go to the land office, locate his scrip, sell the land the instant after the location, although the particular piece of land might be hundreds of miles distant, the scripee might never have seen it, or know anything about it.

It is true that in such case the scripee would be selling something "tangible", a specific piece of land; but he would not know any more about its value than if he had never located it.

It will not do for counsel to answer that in such case the scripee would at least have the *opportunity* to ascertain the value of the land before selling it; for his contention is that the purpose of this law was to protect incompetents and where the legislature attempts to protect incompetents it does not stop with giving them the *opportunity* to protect themselves, but positively and affirmatively prohibits them from doing anything which might injure them; in other words, protects them from their own acts. Therefore, if congress, as counsel asserts, had intended to say to these half-breeds, you are just competent enough to sell your lands if you have made a "personal selection" of them and know the value of the specific piece of land, but are not competent enough to dispose of them where you have not done so, it would have specifically provided

that no half-breed should sell his land unless he had made a "personal selection", or until he had examined the land and had become acquainted with its value.

But, as we have seen, by counsel's own admission, it was possible for every one of these half-breeds, *under the law*, to sell his land, without ever having seen it, and without knowing anything about its value. It is evident either that congress never intended to provide that the scripee should not sell his land unless he made a "personal selection" of it, and was acquainted with its value, or that it was sadly in need of someone to advise it how this could be done.

Petchico, in the case of Doe vs. Wilson, *supra*, Besion, in the case of Crews vs. Burcham, *supra*, the twenty-eight half-breeds, in the case of Dole vs. Wilson, *supra*, all conveyed the lands they were entitled to receive, before the lands were selected, or even surveyed, and, consequently, knew nothing about the location or the value of the lands, and yet the courts held the conveyances good.

How does it happen that this new doctrine of "tangibility" was not applied in these cases?

The vital point raised and relied upon in Doe vs. Wilson was that Petchico had no interest in the land that was assignable, *because the land had not yet been located when he sold it.* And the same point was raised in Crews vs. Burcham, but the court held that while it was true "that no title to the *particular lands* in question could vest in the reservee, or in his grantee, *until the location by the*

President, * * * the equitable right to the lands in the grantee of Besion, when selected, is perfect." (Italics our own.)

We contend, therefore, that this "tangible" argument is not supported either by reason or authority.

As to counsel's suggestion that, owing to the Indian's love of "fire water", it would be very easy to obtain his scrip from him for a drink of whiskey, we would suggest in reply that counsel explain to the court why it would be any more difficult to obtain a deed to the land by the same means, after the scrip had been located.

We have never made a very close study of the question as to the effect of whiskey on the American aboriginee, but we do not think it is unreasonable to claim that if the instruments which call for a piece of land could be obtained from him by the use of whiskey, that a deed for the land itself could just as easily be obtained by the same process, after he had received his title to the land.

The Contention of the Defendants that Sioux Half-Breed Scrip Could be Used by Third Persons to Obtain Land for Their Own Use, is Sustained not only by Reason but by the Authorities as well.

The contention of the defendants that Sioux half-breed scrip could be used by third persons to obtain land for their own use, is sustained not only by reason but by the authorities as well.

The Secretary and counsel contend, as we have already seen, that the Act of 1854 contemplated that the scripee must take the land for his own personal use and benefit, and must claim it for his own personal use, and they contend further that the law absolutely prohibited the scripee from entering into any agreement to convey the land, until after the scrip had been located.

Up to the present point, we have confined ourselves to an argument to show that this contention is unreasonable. We now desire to call the attention of the court to some decisions in which it has been held that it is not in violation of the law for a scripee and a third person to enter into an agreement whereby the third person is to make use of the scrip to obtain the title to land for his own use, and in which land the scripee is to have no interest whatever.

In the case of Thompson vs. Myrick, 20 Minn., 184, the plaintiff had been living on a piece of land to which he desired to obtain title. The defendant, Myrick, had possession of certain scrip, as attor-

ney in fact, for the half-breeds, Longie and Roe, who were minors.

Thompson entered into an agreement with Myrick whereby the latter was to turn the scrip over to the former with power of attorney to locate it, coupled with an agreement that *the land should be conveyed to Thompson as soon as the scrip had been located,* and in consideration of the premises Thompson agreed to pay $2800.

The material part of the agreement was as follows:

> "And whereas the said Nathan Myrick has placed the said scrip and the said power of attorney in the hands of the said Benjamin Thompson, with a view to the location thereof for the benefit of the said minors. Now this agreement witnesseth that the said Nathan Myrick, in consideration of the premises, and the sum of one dollar to him in hand paid by the said Benjamin Thompson, party of the second part, agrees with the said party of the second part, that he will, upon the location of said scrip, *secure the title to the land, whereon the same may be located, to be lawfully vested in the said Benjamin Thompson.*" (Italics our own.)

The scrip, powers, and the above agreement were thereupon delivered to Thompson and he located the scrip upon certain lands in the names of the scripees.

After the location, Myrick, instead of securing the title to Thompson, as had been agreed, caused

the half-breeds, who had arrived at their majority, to convey the lands to Myrick's wife.

Thompson, the plaintiff, commenced an action for specific performance. The defendant urged that the agreement was in violation of the Act of 1854, but the court held otherwise, and decided that Thompson was entitled to a conveyance of the lands located under the scrip.

On page 192, the court says:

> "As to the point that the real object of the contract was to accomplish a transfer of the scrip, we see nothing to distinguish this case in any important respect from Gilbert vs. Thompson, 14 Minn., 544."

But counsel will say, that the contract itself recited that the location was to be "for the benefit of said minors." It doesn't make any difference what the contract recited, the question is what was the real effect and purpose of the contract. It was well understood, and the contract itself provided, that Thompson was to have possession of the scrip and powers to locate it; that he was to locate it on lands of his own selection without consulting the half-breeds or their attorney, and that the lands were to be conveyed to Thompson after the location and that the half-breeds were to have no right, title or interest in the lands. The only benefit that the half-breeds were to get out of the location of this scrip was the $2800 which Thompson was to pay for the privilege of using the scrip in the way he did to obtain the title to the land.

What is the difference between this transaction and the transaction between Eaton and Stram?

Thompson had a certain piece of land in mind to which he desired to obtain the title. He went to an agent of certain scripees and agreed to pay $2800 if they would deliver the scrip to him for location and would agree to convey it to him after the location.

Eaton had a piece of land in mind to which he desired to obtain the title. He went to the agent of Stram and agreed to pay $7000 if she would deliver the scrip to him and give a power of attorney to convey the land after it had been located. The only possible distinction between the two cases is that in one a contract to convey the lands was given and in the other a power of attorney. But there is no difference in principle. Neither the half-breeds, nor their agent, in the Thompson case, had any more to say about the location of the scrip or the selection of the lands than Stram did; and in neither case was the half-breed to have any right, title or interest in the lands, after the scrip had been located, and in both cases the agreemnt to convey was made prior to the location of the scrip.

The case was affirmed on appeal to the Supreme Court of the United States, book 25 Lawyers Ed., 324, and, to show that the particular point in regard to the right to convey was considered and decided by the court, we quote from page 326 as follows:

"Holders of such certificates or scrip were

forbidden to transfer the same, and the defendants contended that the real object of the agreement was to effect a transfer of the same; but the State Supreme Court overruled the defense, and referred to one of their former decisions, assigning the reasons for their conclusion that the defense was not well founded." Gilbert vs. Thompson, 14 Minn., 544.

"Since the cause was submitted, the opinion of the court in that case has been carefully examined, and the court here concurs with the state court that the case is applicable to the present case and that the reasons given for the conclusions are satisfactory and conclusive."

In Hope vs. Stone, 10 Minn., 141, (Gil. 114), a Sioux half-breed, Jennie Cratt, had agreed to convey her land prior to the location of the scrip, and after the scrip had been located she and her husband gave a warranty deed in pursuance of the original agreement. In the controversy that afterwards arose, it was contended that the transaction was in violation of the law. But, on page 123, the court says:

> "There would appear to be no illegality in an agreement to convey lands *when title should be acquired, although at the time of executing such agreement the title is in the United States.*" (Italics our own.)

We maintain, therefore, that both reason and the authorities support the contention of the defendants that an agreement to convey land, prior to the location of the scrip, was not in violation of the Act of 1854.

III.

Conceding that the Power of Attorney to Convey the Land Was Void, and that Eaton Obtained no Title to the Land Through the Power of Convey, the Location of the Scrip Was, Nevertheless, Valid, and, if Eaton Did not Obtain Title Through the Power of Attorney, Stram Obtained Title Through the Locations of the Scrip, and the Secretary, Therefore, Erred in Cancelling the Locations and Taking the Title Away from Stram.

The Secretary's interpretation of that portion of the act which prohibits assignments of the scrip is, that its purpose was to absolutely prevent any conveyance of the land the scripee was entitled to, before the location of the scrip.

The Secretary admits that the scripee had a perfect right to transfer his land the instant after the scrip was located, but holds that the scripee had no power to convey, or to make any agreement to convey, until after the actual location of the scrip, and that such a conveyance, under the law, is void and of no effect. And as the Secretary found that Stram had executed a power of attorney to convey the land before the location of the scrip, and that a conveyance of the land had been made to Eaton under this power, he held it to be his duty to cancel the scrip locations and throw the land again open to public entry.

The defendants, on the other hand, say, that if it be conceded that the law prohibited conveyances of the land before the location of the scrip, and that the conveyance to Eaton was, therefore, void, that, consequently, such conveyance vested no title in Eaton, but that the title was still in Stram under the scrip locations, and that the Secretary had neither the right or power to take the title away from Stram, and, therefore, under his own theory of the law, he erred in cancelling the locations.

The scrip in this case was located under power of attorney duly executed by Stram. The land office circulars, to which we have heretofore referred, 1 Lester, L. L. 627, 1 Copp's P. L. L. 721, both provided that this scrip could be located by power of attorney, and Secretary Vilas himself admits that the scrip could be located by power of attorney for, in Allen vs. Merrill, 8 L. D., on page 217, speaking of the power to locate, he says: "Nothing, therefore, to challenge the bona fides of the transaction then appears on the surface, *nor any reason why the land office should not recognize it as the fair exercise of the right to do by an attorney what one might lawfully do himself.*" (Italics our own.)

Here is an explicit recognition by the Secretary of the right to *locate* scrip by power of attorney.

The power of attorney had been duly executed by Stram; it is admitted that she was entitled to

320 acres of land and that the land in question was subject to location under this scrip; the government had received and cancelled the scrip in return for the land taken, and the scripee had not asked to have the locations cancelled. Why, therefore, even under the Secretary's theory of the law, should the locations have been cancelled and the title taken away from Stram?

But, the Secretary says, the law absolutely prohibited conveyances of the land before the location of the scrip; Stram had entered into an agreement to convey the land to Eaton before the scrip was located, and it was necessary to cancel the locations in order to prevent the title from vesting in Eaton.

But if his theory, that a conveyance of the land before location of the scrip was prohibited, is correct, then the instrument of conveyance was null and void and no title was conveyed to Eaton by it, but the title remained in Stram.

This would not be like a case where a party has the *power* to convey land and a conveyance is obtained from him by fraud. Such a conveyance is merely voidable and the conveyance is good until set aside. But, if the contention of the Secretary is right, Stram, before the location, had no *power* to convey; she had no conveyable interest, and, therefore, nothing passed by her instrument of conveyance. In the case of the title obtained by fraud the grantor had the *power* to convey, but the title was not rightfully obtained; but in the case of

Stram, under the Secretary's construction of the law, there was an entire absence of *legal authority,* and she could not invest herself with a power which the law denied to her.

But, counsel for plaintiff says, this is mere quibbling, and that if the Secretary had not interfered and cancelled the location, Stram and Eaton would have succeeded in evading the law and in passing the title to Eaton.

Assuming the Secretary's construction of the law to be correct, we deny that the title to this land would have passed to Eaton if the Secretary had not cancelled the location.

The records of title show that the power of attorney to convey was executed the 25th day of May, 1883; the records further show that the scrip was located on the 16th day of June, 1883. Therefore, it will always and eternally appear, *upon the face of the records,* that the power to convey was executed *before* the scrip was located.

We have then this situation: The records themselves disclose the fact that the conveyance was made three weeks before the location; the Secretary claims that the law absolutely prohibits such a conveyance; from this it follows that a bare inspection of the records would reveal that the conveyance from Stram to Eaton was void and that the latter obtained no title to the land.

The Secretary avows that he cancelled the location *to prevent the title from vesting in Eaton.* But, if his theory of the law is correct, the records

themselves showed that Eaton had no title, and the Secretary's official declaration of that fact was entirely perfunctory and unnecessary.

The courts have time and again decided that if a patent, or other instrument, *shows upon its face,* that it was issued without authority, it is void and of no effect. Upon the same theory, if the records showed that Stram had no authority to make this conveyance, it was void and no title passed to Eaton. If the Secretary had not cancelled the location, and Eaton had attempted to convey the land to a third person, such a conveyance would have vested no title in his grantee, if the Secretary's construction of the law is right; for an examination of the records would have disclosed to the grantee that Stram's attempted conveyance to Eaton was made *before the location,* and the application of the Secretary's theory of the law to these facts would have informed the purchaser that Stram had no power to make such a conveyance; that it was therefore void and that the purchaser could obtain no title from Eaton.

The Secretary bases his right of action in cancelling the location, solely upon the ground that it was necessary to prevent an evasion of the law, to-wit., the conveyance of the land to Eaton. But, if the Secretary's construction of the law was correct, it was already *apparent upon the face of the records,* that by force of law the title had not passed and could not pass to Eaton, and there was no foundation for his action and he was without authority to cancel the location.

On page 100 of his brief, in the court below, counsel for plaintiff says:

> "We are told that a mere *attempt* to evade the law against the assignment of the scrip involves no moral turpitude and that the Indian is not *penalized by reason* of such attempt; and the memoranda of the court below go further and hold that the white man who has not merely attempted but *confessedly succeeded* in evading the clause against the assignment of the scrip is not *penalized* even to the extent of having the location made *for his exclusive use and benefit cancelled.*" (Italics our own.)

But the fallacy of the position both of the Secretary and of counsel for the plaintiff lies in the assumption that Eaton would have "*confessedly succeeded*" in evading the law, unless prevented by the interposition of the Secretary's action cancelling the location.

If it be conceded that the agreement between Stram and Eaton was an attempt to evade the law, and if this design *would have become effective* unless prevented, then, undoubtedly, the Secretary would have been warranted in cancelling the location in order to prevent the *accomplishment* of the design. By inference and implication, the argument of the Secretary and counsel lead to the conclusion that if Eaton and Stram *would not have succeeded* in evading the law, then the Secretary would not have been warranted in cancelling the location, for the only justification they plead for his action is *that they would have succeeded.*

Now, what, according to the Secretary, were Eaton and Stram trying to do? They were trying to convey title to the land *before location of the scrip;* this is the offense complained of.

But, as the fact appeared, *upon the face of the records,* that the conveyance was made *before the location,* and as the Secretary claims that, under the law, such a conveyance is void, all anyone had to do was to apply the law to the facts as they appeared, to see that the conveyance was of no force or effect. If it had no force or effect, then no title passed to Eaton. If no title passed to Eaton, then Stram and Eaton *had not succeeded* in evading the law. If Stram and Eaton had not succeeded in evading the law, then the Secretary was not warranted in cancelling the location; for, under his own admission and that of counsel, his only purpose in cancelling the location was to *prevent* an evasion of the law.

The Secretary attempted to take the title away from Eaton, on the assumption that the title was already, or would be, in Eaton if he did not take it away. But the records showed, under the Secretary's theory of the law, that no title was in Eaton. What the Secretary actually succeeded in doing, if his interpretation of the law is right, was not in taking the title away from Eaton, but in taking it away from Stram.

The law does not concern itself with ineffectual attempts to evade its provisions. It is only acts that either have, or may, become effectual that it lends its aid in correcting. If John Jones forges

the name of John Smith, and in this way attempts to convey the latter's property, the law will intervene, for, unless it does, the attempted fraud may be consummated. But if John Jones, in his own name, attempts to convey the property of John Smith, there is no necessity for the intervention of any court or tribunal for it already appears, upon the face of the records, that the deed is void and that Jones has not accomplished what he attempted. The law, which everyone is presumed to know, informs everyone that the deed of Jones is a nullity. By the same reasoning, if Stram had no *power* to convey the land before location, and if it appears upon the face of the records that she attempted to convey *before location,* she has accomplished no more than Jones did when he attempted to convey the property of Smith. An application of the law to the facts, as they appear on the records, informs everyone that her attempt was futile and that the title is still in herself.

Art. 12 of the treaty with the Senecas, 7 St. at Large, 350, provides:

> "The lands granted by this agreement and convention to the Seneca tribe of Indians, shall *never* be sold or ceded by them, except to the United States."

A conveyance of these lands to third persons by the Senecas would not have vested any title in the grantees, and there would not have been any necessity for a court, or other tribunal, to set the

conveyances aside, because the law would inform every one that the Senecas had no *power* to make the conveyances and that the title was still in themselves, notwithstanding their attempt to convey.

We deny that the Act of 1854 prohibited the scrpiee from entering into an agreement, before the location of the scrip, to convey his land; but we say that even if it did, as the Secretary contends, that such an attempted conveyance would vest no title in the grantee, any more than an attempted conveyance by the Senecas, under the treaty referred to above, would have vested title in their grantee.

It is true that the Senecas were perpetually prohibited from conveying their lands, and that the Secretary only claims that the Sioux half-breeds were temporarily restrained from transferring theirs, but, if they were prohibited at all, they had no more power to convey, during the period for which they were prohibited, than the Senecas did. It would be a question of the *power* to convey in both cases.

Summed up, therefore, the Secretary's position is this: That the Act of 1854 prohibited conveyances of the land until after the location of the scrip; that Stram had attempted to convey the land to Eaton before the location; that it was necessary, therefore, to cancel the locations in order to prevent the title from vesting in Eaton.

In reply to this the defendants say, that if it be conceded, which it is not, that the act prohibited transfers of the land until after the location of the

scrip, then the law informed Eaton and everyone else that the scripee had no power to make such a conveyance; and as it appeared upon the face of the records that the conveyance to Eaton was made before the location of the scrip, the application of the Secretary's theory of the law to the facts would show that Eaton obtained no title by the conveyance, and, consequently, it was not necessary to cancel the locations in order to prevent the title from vesting in Eaton.

As it was not necessary, therefore, to cancel the locations in order to prevent the title from vesting in Eaton, there could be only one other reason why the locations should be cancelled, and that is as a punishment to Stram for what the Secretary conceived to be a violation of the law by her in agreeing to convey the land to Eaton before the scrip was located.

But the Act of 1854 does not provide any penalty for the violation of any of its terms.

In the case of Gilbert vs. Thompson, 14 Minn., on page 416, the court, speaking of an attempt to transfer the scrip, says:

> "Such attempt to transfer would not involve any moral turpitude, nor the breach of any legal duty, as is the case with an attempt to transfer a pre-emption right. It would be simply ineffectual because the scrip is not transferable."

Under the pre-emption act, an agreement to

convey the land before final proof was followed by a forfeiture of the pre-emption right. But neither the Secretary or counsel claims that an agreement to convey the land before location of the scrip is followed by a forfeiture of the scrip, under the Act of 1854. In fact, the records of the Interior Department in this very case, show, that shortly after the decision of Secretary Vilas cancelling the scrip locations, the Department formally offered to return the scrip to Eaton, but he stood upon his rights and refused to accept it; but thereafter it was returned to the heirs of Stram, who had in the meantime died, and was actually located a second time on lands in Wisconsin.

It is apparent from this that the Department did not consider that Stram had forfeited her right to the scrip by agreeing to convey the land to Eaton, because it returned the scrip to Stram's heirs and permitted its relocation.

By the Department's own admission, then, Stram was entitled to a return of the scrip and entitled to relocate it the moment after the Secretary rendered his decision cancelling the original locations.

Why, then, should the locations have been cancelled and the title taken away from Stram? even if it be conceded that Eaton was not entitled to the land?

If Stram had been in the land office the moment the Secretary's decision became effective, she would have been entitled to an immediate return of the scrip, and could have turned around and re-

located it the next instant on the very land from which it had, but a moment before, been cancelled.

It cannot be possible that the law requires any such senseless proceeding as this. No one would be benefitted by it, no public or private purpose would be subserved by it.

Think of the Secretary of the Interior in a case of this kind solemnly announcing: Mr. Scripee, you have committed a grave offense against the law. The statute provides that no agreement to convey the land shall be made until after the scrip has been located. You have made such an agreement, but it is void, and it is necessary for me, therefore, to cancel the locations of the scrip. But the law does not visit any penalty upon its violation, and I, therefore, return your scrip to you and you may relocate it on the land upon which you originally placed it if you see fit to do so.

Such a proceeding as this, cancelling the scrip locations and immediately thereafter permitting its relocation, would be but an idle ceremony, for it would leave both the government and the scripee in exactly the same position they were in before the locations were cancelled.

The very decision of the Secretary in which he cancelled this location, furnishes an illustration of the rule as to when it is necessary, and when not necessary, to cancel a location or filing for an attempt to evade the provisions of law. In the decision in which he cancelled this location he also cancelled Hyde's application for a pre-emption entry on this same land. The ground for his action was,

that Hyde had entered into a *secret* contract with a third person to convey an interest in the land as soon as he should obtain the title. There are two things that distinguish the Hyde transaction from the Stram transaction. In the first place, the agreement between Hyde and the third person was a *secret* one and would never have become a part of the public records. In the second place, such a contract is *corrupt* in the eyes of the law and is punished by a *forfeiture* of the pre-emption right; it is *malum in se.* On the other hand, the Stram contract, conceding that it was prohibited, did not involve a *forfeiture* of the scrip, nor was the act one involving mor al turpitude, it was merely *malum prohibitum.*

There are two reasons why the Hyde application should have been cancelled. First, because Hyde's *attempt* to evade the pre-emption law, by agreeing to convey an interest to a third person, *would have been accomplished* unless prevented by the Secretary's action cancelling his application. Second, the law distinctly enjoins it as a duty upon the land officers to *cancel the pre-emption entry when such a fraud is attempted.* Sec. 2262 of the pre-emption act provides, that the pre-emptor shall make an oath "that he has not, directly or indirectly, made any agreement or contract, with any person, by which the title should inure to the benefit of any person except himself; and if any person taking such oath swears falsely, he shall forfeit the money which he may have paid for such land, and all right and title to the same." The difference in

the two transactions is perfectly manifest. In the case of Stram the alleged attempted evasion of the law could not have become *effective;* second, conceding the act was prohibited, *forfeiture* of the scrip did not follow as a *punishment.* The *test* applied by the Secretary is, has there been an *attempt* to evade the law; the *test* that we apply is, will the attempt *result* in an evasion of the law.

The courts have also held that an attempt to transfer the scrip was not a void and illegal act necessitating action to rectify it, but that it was simply ineffectual.

In Gilbert vs. Thompson, 14 Minn., on page 416, the court says:

> "It follows that any attempt to transfer the scrip, directly or indirectly, would be of no effect as a transfer. The title to the scrip would remain in him,and the title to the land acquired by it would vest in him just as though no such attempt had been made. Such attempt to transfer would not involve any moral terpitude, *nor the breach of any legal duty,* as is the case with an attempt to transfer a pre-emption right. It would be simply *ineffectual* because the scrip is not transferable." (Italics our own.)

And in Dole vs. Wilson, 20 Minn., 308, the court says:

> "But as was held with Gilbert vs. Thompson, 14 Minn., 544, the transfer of the certificates would not be illegal, but only *ineffectual* and void, as a transfer of the title to the same."

We contend, therefore, that even if *it* be conceded that the act prohibited conveyances of the land before location of the scrip, that the Secretary, nevertheless erred in cancelling the scrip locations; for if the act did prohibit conveyances of the land before the location of the scrip, then, as it appeared upon the face of the records that the agreement to convey to Eaton was made before the location, the records themselves showed that the conveyance was void and that Eaton obtained no title under it. And as it is admitted that Stram was entitled to 320 acres of land, and it is also admitted that the law did not provide a forfeiture of the scrip, even if her attempt to convey to Eaton was in violation of the act, then, Stram was entitled to the land even if Eaton was not, and the Secretary erred in cancelling the locations.

If the Secretary erred in cancelling the locations, then the title to the land in question remained in Stram, even if it be conceded that it was not in Eaton.

On March 31, 1886, Stram and her husband conveyed the land in question to Eaton by warranty deed. See Record, page 146 et seq. By the terms of this deed the grantors ratified and confirmed all the acts of Eaton and Merritt under the powers of attorney to locate the scrip and sell the land. The deed also conveyed the property outright to Eaton.

The defendants claim that, even if it be conceded that Eaton obtained no title through the conveyance made to him by Merritt, under the power of attorney given to Merritt by Stram to sell the

land, he *nevertheless obtained title* under the conveyance made to him by Stram and her husband in 1886.

Both counsel and the Secretary admit that the scripee had a perfect right to convey her land the instant after the scrip had been located. The deed of March 31, 1886, was made after both the location and adjustment of the scrip. As the title to the land was in Stram, in March, 1886, if it was not already in Eaton, he certainly became vested with the title from that time, even if he had not obtained it sooner under the conveyance made by virtue of the power of attorney from Stram to Merritt.

IV.

THE AUTHORITIES CITED BY PLAINTIFF IN ERROR.

In his brief in the court below, counsel cited a long list of authorities as bearing either directly or indirectly on the issues involved in this action; but Mr. Washburn, in his brief, has made such an exhaustive, and, to our mind, such an entirely satisfactory review of these authorities, that we shall only examine the two cases which counsel claims are decisive of the issues involved in the case at bar.

These cases are, Fee vs. Brown, 162 U. S. 602, Book 40, Lawyers Ed., 1068, and Felix vs. Patrick, 145 U. S. 317, Book 36 Lawyers Ed., 719.

THE CASE OF FEE VS. BROWN.

If this case held that alienation of the land, under Art. 2 of the Chippewa treaty, was prohibited before the scrip had been located, it would undoubtedly be entitled to great consideration in construing the Act of 1854. But it does not, and the decision does not turn upon the construction of the treaty, *but upon an act of congress.* From the statement of the facts made by the court it appears, that one Brown had located a piece of Chippewa scrip, under power of attorney, in Colorado. Under the treaty such scrip could not be located in that state, and a great deal of this scrip had been located beyond the limits permitted by the treaty itself. To remedy this, congress on June 8, 1872, passed an act to permit persons who had located this scrip outside the territory in which it was allowed, to buy the lands located under such scrip at $1.25 per acre.

Brown, learning that the title he had obtained under the scrip was invalid, purchased under the Act of 1872, and patent, *under that act,* was issued to him December 1, 1876. *"This patent,* Fee attacked as void upon its face, and as having been issued without authority of law." Statement made by the court.

Fee had settled upon the land, applied to enter it as a homestead and attacked Brown's title.

But the question before the court was not whether the patent under the scrip location was void, but that issued under the Act of 1872.

The opening sentence of the decision reads:

"This case *turns* upon the proper interpretation of the act of congress of June 8, 1872." (Italics our own.)

Again, on page 611, the court reiterates: "The validity of Brown's title must turn, then, upon the patent issued to him on June 8, 1872."

The only reason why the court had occasion to consider or refer to the treaty was because it was a part of the history leading up to the Act of 1872. Congress had the *power* to pass the Act of 1872 whether the locations of the scrip in Colorado were valid or invalid; and if they did pass such an act and Brown had taken advantage of it and purchased under it, his title was good even though it be conceded that his use of the scrip was invalid. If this be so, why was it necessary to consider the treaty? There was another point in the case that would have affected the decision even if it had been squarely decided upon the construction of the treaty itself, and that was, that it was conceded there was no power, even in the half-breed in person, to locate the scrip in Colorado.

It is true that Justice Brown uses some language about its being a device to evade the provisions against the assignment of the scrip, but this language occurs in that portion of the opinion containing a historical statement of the facts leading up to the Act of 1872. The very way in which the language is used shows that the position is assumed. In fact, on page 607, after stating that the scrip could in nowise inure to the benefit of any other

person or persons whatsoever, the court says: *"This seems to be conceded in this case."* If both parties to the suit *were agreed on this point,* it must have been some other point that was in dispute. Parties do not ordinarily go into courts to fight over matters they are already agreed on; and points which are agreed on are not very carefully presented to the court.

We think it appears on the face of the decision that the language in reference to the scrip is pure dictum.

We have already called the attention of the court to Hartman vs. Warren, 19 L. D., *supra;* Hartman vs. Warren, 76 Fed. Rep., *supra;* and Dole vs. Wilson, 20 Minn., *supra,* construing this same treaty. In these cases the point was *squarely raised* that the powers of attorney to locate and sell were a device to evade the provisions of the law; but the courts held the conveyances valid.

THE CASE OF FELIX VS. PATRICK.

The facts in this case were, that someone, unknown, had, *by fraudulent practices,* obtained a piece of scrip and a quit claim deed signed in blank, from Felix, and the scrip and deed came into the hands of the defendant, Patrick, who located the scrip on land in the city of Omaha, and then caused the blank quit claim deed to be filled out and filed. In 1869 congress passed an act confirming the title to the land in Patrick. About twenty-five years after the scrip had been located, the heirs of the half-breed, Felix, commenced this action against Patrick. *The bill alleged that the scrip had been ob-*

tained from Felix by fraud; that no consideration whatever had been paid to her for the scrip; that, by reason of the manner in which the scrip had been obtained from her, no title passed, either to the scrip or to the land taken thereunder. The bill further alleged that the act of 1869 was unconstitutional and void, that Patrick held the title in trust for the plaintiffs and asked the court to so decree. The case arose on a demurrer to the bill; consequently, all the allegations of the bill are admitted.

Counsel claims that the decision in this case "is decisive" of the case at bar. A very cursory view of the facts in the case will show first, that no such questions were raised in that case as in the case at bar, and, second, that the decision, as made, *did not, and could not,* have turned on such questions, even if they had been raised.

Now, what is the main point in the case at bar? It is, whether the volutary agreement to convey the land, made between Stram and Eaton, was void, in law, and whether the Secretary was, for this reason, warranted in cancelling the scrip location. But the plaintiff's in the Felix case raised no such point as this. They did not claim that the *original location of the scrip was void* because there was an agreement between the scripee and Patrick to convey the land. They were in court claiming that Felix had not voluntarily parted with the scrip at all; that it had been obtained from her by Patrick's predecessor *by fraud and without consideration,* and, therefore, that Patrick held the title in trust for Felix.

The vital distinction betwen the two cases is, that in one the point was, that Stram and Eaton had voluntarily entered into an arrangement to convey the land, prior to the location of the scrip, which the Secretary held was a *violation of the law.* Necessarily, therefore, the provisions of the *law* in this case were the subject of inquiry. The point in the Felix case, however, was, not that the Act of 1854, had been violated, but that a fraud had been committed against Felix and that *her rights had been violated.* This question of fact was, therefore, the subject of inquiry in the Felix case, and its investigation did not involve a consideration of the provisions of the law at all, for a fraud could have been committed against Felix whether the law did, or did not, permit agreements to convey the land.

If the facts in the Felix case had been that Felix had voluntarily entered into an agreement with Patrick's predecessor to convey the land she was entitled to, and in pursuance of such agreement she had delivered the scrip and a blank quit claim deed to effect the conveyance after location of the scrip, then, undoubtedly, the decision in that case would be decisive of the case at bar.

But the plaintiffs denied that Felix had voluntarily parted with either the scrip or deed, and alleged that they had been obtained from her by fraudulent means.

It is manifest from this that the plaintiffs in the Felix case were not attacking Patrick's title because of the manner in which the scrip and quit

claim deed were *used*, but because of the fraudulent manner in which they were *obtained*.

But the particular vice complained of in the Stram case is the manner in which the scrip was *used*. Consequently, it is apparent that entirely different questions were presented for consideration in the two cases.

But, aside from these considerations, a careful reading of the case will show, that the court did not *pretend* to consider the nature or purpose of the Act of 1854, and that whatever language is used in the case in regard to such use of the scrip being illegal is purely incidental, as is shown by the fact that the court *assumes* it would be illegal without argument or discussion.

This case was first decided by Justices Brewer and Dundy sitting as a circuit court, and is reported in 36 Fed. Rep. 457. Justice Brewer wrote a long and elaborate opinion. The case itself shows that there was an unusual array of able counsel on both sides. Under such circumstances and considering the fact that the property in controversy was worth a million dollars, every possible point that could have any bearing on the case would be elaborately discussed by counsel and carefully considered by so able a jurist as Justice Brewer. And yet, there is not a word in this decision that would indicate that any such questions were presented to the court as are involved in the case at bar. The Act of 1854 is only mentioned in the most incidental way and Justice Brewer, in the course of the decision, says, that the principal points raised by counsel were the

validity of the Act of Congress of 1869, confirming the title in Patrick, and the question of laches, and the decision is based squarely on the latter question.

The decision in the Supreme Court was also decided on the question of laches, for in the second paragraph of the opinion the court says: "The most important question in this case, however, the question upon which the result must ultimately depend, is that of laches."

Justice Brown, who wrote the opinion in the case of Fee vs. Brown, *supra*, also wrote the opinion in Felix vs. Patrick, and used almost the identical language in regard to the Chippewa half-breed scrip, in the former case, that he does in regard to Sioux half-breed scrip in the latter. We were also informed by the court itself, in the case of Fee vs. Brown, that all parties conceded that the manner in which the scrip was used to acquire the land was illegal. If that is so the question could hardly have been discussed.

This, no doubt, also accounts for the use of the language in regard to the illegal handling of the scrip in the Felix case. The question was not in issue; it was not presented or argued to the court, and Justice Brown *assumed* such use of the scrip to be illegal from the bare fact that it was not disputed by either of the parties to the suit.

If our views in regard to the effect of the decisions, in the cases of Fee vs. Brown and Felix vs. Patrick, are correct, then the plaintiff is left without any authorities to support its contention, for

these are the only two cases upon which counsel relies, as being decisive of all the issues in the case at bar.

V.

The Question of the Right of Third Parties to Use Scrip to Obtain Land for Their own use Had been Res Adjudicata in the Land Department for Twenty Years at the time Eaton Entered into the Agreement with Stram.

The defendants deny that the agreement between Stram and Eaton violated either the letter or the spirit of the law, but they contend that even if it did there were two things which fully justified them in entering into the agreement, and that the Secretary, therefore, erred in cancelling the locations. These two things were:

1. That more than twenty years before the transaction between Stram and Eaton, the land department had held that third persons might use Sioux half-breed scrip for the purpose of acquiring the title to land for their own use and benefit; that this decision had never been overturned or called in question by the Department, until the decision rendered by Secretary Vilas in the case of Hyde vs. Eaton in 1889; that during all of this period the people had a right to rely, and did rely, upon this decision as a correct interpretation of this law; that it had become a rule of property and that it was,

therefore, inequitable and unconscionable to overturn it after such a lapse of time, even though as a matter of law the decision was wrong.

We refer to the decision in the case of Felix vs. Carroll, which was rendered in 1863, and which is printed as Appendix B to this brief.

Counsel contends that the facts in the Felix case are different from the facts in the case at bar, and that it is not, therefore, in point.

On page 112 of his brief, in the court below, he says:

> "It is obvious that he (Secretary) considered that the location was made for the benefit of the half-breed."

If this statement is correct, counsel is undoubtedly right, for the complaint made against the use made of the scrip in the Stram case was that the location was made for the benefit of Eaton; that is that Eaton and not Stram was to receive the land.

The question as to whether or not the Secretary considered that the location was made for the benefit of the half-breed, or for the benefit of a third person, depends upon the facts which were presented to him; and, in order to show that the specific question in this case was whether a location, made for the benefit of a third person, is valid, we quote from the record in this case as it appears in the Department.

> *"In this case the issue was, whether the location was made in the interest of the scripee,*

or of another person, one Patrick, as charged by the contestant. Three witnesses were introduced at the trial whose testimony tended to show that no such person as Felix, the scripee, was known, that no such person was in existence, *and that the real beneiciary was Patrick.* The Register of the local office indorsed on the papers a certificate in the following words:

"The location in the name of Sophia Felix was *not* made by said Sophia Felix in person, but by one Augustus Kountze, of Omaha, for the benefit, as I believe, of M. L. Patrick. The warrant issued to said Felix is not transferable, and as I had never seen such a warrant, I permitted the entry by another party because I was informed by the former register of the Dakota Land Office (Dr. Groff) that such entries had been common under similar circumstances at that office." (Italics our own.)

This is the same location of scrip that was referred to in the case of Felix vs. Patrick, *supra,* and it will be remembered that it appeared in that case that some one, unknown, had, by fraudulent means, obtained possession of an application to locate the scrip and a blank quit claim deed, both signed by Felix, and that Patrick, desiring to obtain the title to a particular piece of land, had obtained possession of the blank application and quit claim deed, caused the scrip to be located in the name of Felix, and then caused the land to be conveyed to himself by means of the blank quit claim deed.

It is perfectly apparent, therefore, from the facts in the case, that the Secretary did not think that the location was made for the benefit of Felix.

But the language of the decision itself shows that the Secretary did not consider that the location was made for the benefit of Felix.

The Commissioner had *decided against the location* on the ground that the location was not made for her benefit.

We quote from the decision itself the ground upon which the Commissioner decided against the location:

> "The location of the scrip, although made in her name, was not made by her in person, nor by her guardian or duly authorized agent for her use and benefit, but by an unauthorized person, *and for the use and benefit of a person having no legal interest therein.*"

The precise question presented to the Secretary for decision, then, was: Is a location of scrip made, not for the benefit of the scripee, but for the benefit of a third person, valid?

The Secretary's answer to this was as follows:

> "As the certificate of location issued in her name, and the patent will issue to her, neither the Register's report or the affidavit of third parties can be admitted to establish the interest in the location."

Here the Secretary emphasizes the fact that the only concern of the Department was, to see that the certificate of location issued to her and that the patent will issue to her.

Counsel picks out sentences here and there in

this decision and, by some fine verbal distinctions and discriminations, attempts to show that this decision does not hold what we claim it does.

It doesn't make very much difference what particular form of words the Secretary used to express his views. The essential question is what did he *decide*, what was the *result* of his action. The Commissioner had held that where a person, other than the scripee, had located, or caused to be located, a piece of scrip on land, the title to which was to inure to the sole benefit of such person, that the location was in violation of the law and could not be allowed.

The Secretary reversed the Commissioner on this holding and allowed the location. On this state of facts it does not require much thought or research to determine what the Secretary decided.

But counsel says, there is a marked distinction between the two cases, because in the Felix case the application to locate was signed by the scripee herself, and in the Stram case the location was made by power of attorney.

This is a mere quibble. Is counsel for plaintiff ready to admit that if Stram had signed the application to locate the scrip and had given Eaton a blank quit claim deed signed by herself, instead of executing powers of attorney to locate the scrip and sell the land, and Eaton had used the deed to convey the land to himself, that the transaction would have been valid?

The whole burden of plaintiff's complaint has been that the execution of the two powers of attor-

ney *was a mere device to permit Eaton to obtain the land.*

But this purpose could have been accomplished just as well by the use of a blank quit claim deed as by a blank power of attorney. If either was a violation of the law, which we deny, the one was as much of an offense as the other.

In order to avoid any confusion as to the effect of the decisions in the cases of Felix vs. Patrick and Felix vs. Carroll, we call attention to the difference in the facts that were presented for consideration in the two cases.

In Felix vs. Patrick the complaint was that the scrip and quit claim deed had been obtained by fraud and without the payment of any consideration.

In Felix vs. Carroll, however, the ground of complaint was that the scrip had been located for the benefit of Patrick, and not for the benefit of Felix.

In Felix vs. Patrick, the plaintiffs did not attack *the original location,* but treated it as genuine and contended that Patrick held the title in trust for them because the scrip and deed had been obtained from their ancestor by fraud.

In Felix vs. Carroll, however, the contestant attacked the *original location* because it had not been made for the benefit of the scripee.

In Felix vs. Patrick, the precise question presented for consideration was the manner in which the scrip and quit claim deed had been *obtained.*

In Felix vs. Carroll, the precise question pre-

sented for consideration was the manner in which the scrip had been *used.*

We contend, therefore, that Felix vs. Patrick is not an authority for the plaintiff and that Felix vs. Carroll, is an authority for the defendants.

Here was a decision, then, rendered by the highest authority in the Department whose duty it was to construe and administer this law, holding that scrip could be used for exactly the same purpose for which Eaton used it.

This decision had stood unquestioned for over twenty years, and Eaton and every one else had a perfect right to rely upon it.

If they could not rely on a decision rendered by the Secretary of the Interior, where could they go to ascertain what their rights were? For what purpose does the Secretary render decisions if not to establish and settle the law for the Department over which he presides.

Any layman or lawyer would be fully justified in concluding that the decision in Felix vs. Carroll held that third persons could use Sioux half-breed scrip for the prpose of acquiring land for their own use and benefit. If this is so, then it was inequitable and unconsciable for the Department to overrule it after it had stood unquestioned for over twenty years and every one had honestly acted upon it, even though the decision, as a pure question of law, was wrong.

The Supreme Court of the United States has, in numerous cases, held that where the officers of the executive branch of the government, have, in the

performance of their duties, construed a law, and such construction has been acted upon for a considerable length of time, that the courts will not overturn it, even though, in the opinion of the court, the construction is wrong.

In Brown vs. United States, 113 U. S., 568, the court says:

> "The appellant asserts that this section applies only to commissioned officers and not to warrant officers, to which latter class Brown belonged."
>
> "*It must be conceded that were the question a new one, the true construction of the section would be open to doubt.* But the findings of the court of claims show that soon after the enactment of the act, the President and the Navy Department construed the section to include warrant as well as commissioned officers, and that they have since that time adhered uniformly to that construction, and that under its provisions large numbers of warrant officers have been retired. This contemporaneous and uniform interpretation is entitled to great weight in the construction of the law, and in a case of doubt ought to turn the scale."
>
> "In Edwards vs. Darby, 12 Wheat 206, it was said by this court that: 'In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to great respect." This case is cited upon this point with approval in Atkins vs. Disintegating Co., 18 Wall 301, (85 U. S. XXI., 844); Smyth vs. Fiske, 23 Wall., 482, (90 U. S. XXIII., 49); U. S. vs. Pugh, 99 U. S., 265,

(XXV., 332; and in U. S. vs. Moore, 95 U. S., 763, ((XXIV., 589.).

"In the case last mentioned the court said that: 'The construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons. The officers concerned are usually able men and masters of the subject. Not infrequently they are draftsmen of the laws they are afterwards called upon to interpret.' And in the case of U. S. vs. Pugh, the court said: 'While, therefore, the question,' the construction of the Abandoned and Captured Property Act, 'is one by no means free from doubt, we are not inclined to interfere at this late day with a rule which has been acted on by the court of claims and the executive for so long a time.'"

The language in the above case is used with reference to purely administrative officers. Much greater weight, therefore, should attach to the decisions of the Secretary of the Interior, who is vested with quasi judicial powers.

VI.

The Custom of Handling Sioux Half-Breed Scrip from the time It Was Issued in 1857, to the time the Decision of the Secretary in Hyde vs. Eaton Was Rendered in 1889, was Identical in every Particular with the Manner It Was Used by the Defendant Eaton.

The second reason why we claim that the decision in this case should be in favor of the defendants, even if it were conceded that the agreement between Stram and Eaton was in violation of the Act of 1854, is, that the manner in which Eaton used the scrip was the same as had been in vogue from the time the scrip was issued until the Secretary rendered his decision in the case at bar; that the practice was so open and notorious and had been continued for such a length of time, without objection by the Department, that it amounted to a practical construction of the law upon which the people had a right to rely.

We have already pointed out, in a former part of this brief, that for a period of thirty-five years, this scrip had been constantly, habitually and customarily handled in exactly the same way it was by Eaton. In fact, so open and notorious was the practice that Judge Moer in his memorandum, in the case at bar, says that probably three-fourths of it had been used in this way; and so general had this practice become that the Supreme Court of Minnesota in the case of Courselle vs. Weyerhauser, *supra,* has taken judicial notice of it; the Circuit

Court of the United States, in the case of Felix vs. Patrick, *supra,* has taken judicial notice of it, and Secretay Vilas has taken notice of it, for in the case of Allen vs. Merrill, on page 217, he tells us that this scrip was customarily handled in this way.

There are still other evidences that this scrip had been habitually handled in this way.

In the case of Hyde vs. Eaton, both the Register and Receiver joined in an opinion that the scrip could be used in this manner, after a contest specially instituted to test the validity of such use of Sioux half-breed scrip.

In the case of Allen vs. Merrill, the local officers allowed the locations to stand, after a contest in which the same questions were raised as in Hyde vs. Eaton.

In Felix vs. Carroll, the local officers allowed the location, after a contest, as we have seen, in which the precise question presented was, whether a location of scrip for the use and benefit of a person other than the scripee was valid. And the Register of the local office, in that case, tells us that he "was informed by the former Register of the Dakota Land Office (Dr. Groff) that such entries had been common under similar circumstances at that office."

It is evident from the action of these officers, located in three different states in the West, in allowing the locations of this scrip, after contests specially instituted to test the question of the validity of locations made for the use and benefit of persons other than the scripee, that they believed the scrip

was being used in accordance with the customary practice in such cases.

It is also to be remembered, that these officers were located in that portion of the country where the greater part of this scrip was used, and, consequently, had both personal and official knowledge of the manner and custom of its use.

Now, if this practice had prevailed to such an extent, and for such a length of time, that the land officials themselves, throughout the West, had come to regard it, not only as the customary practice, but as right and proper, and in accordance with the provisions of the law, is it any wonder that the people came to the same conclusion and honestly believed that this scrip could be used in this way?

And if the people honestly believed that this scrip could be used in this way, induced to do so by the customary practice which had prevailed for more than twenty-five years, and by the practical recognition of this practice by the land officials themselves in allowing locations of this scrip, where it was located for the use and benefit of persons other than the scripee, is there any rule of law or equity which requires the cancellation of a location of scrip made under such circumstances?

As a matter of fact, no one has been injured by the transaction between Stram and Eaton, even if it is admitted that it was contrary to the statute, except that impalpable and impersonal thing which we call the law.

The scripee has not been injured, for, according to the Register and Receiver, she was fairly dealt

with, was satisfied with her bargain, has never asked to have it set aside, and if the land is taken away from Eaton it will not be restored to her.

The government has not been injured, for it has cancelled its obligation and has received the scrip it was compelled to redeem.

The plaintiff can not complain, for it has admitted on the record that it purchased this land with full knowledge of the claimed rights of the defendants.

And now, after a lapse of more than forty years since the passage of this law; after more than a quarter of a century's recognition of this custom by the Department, the only tribunal appointed to administer and construe this law; after this defendant, relying upon the recognition of this custom, had purchased this scrip and parted with over seven thousand dollars of his money, with no thought that he was violating the law, and the violation, if violation at all, one, as the courts tell us, involving no moral turpitude,—after all this, the plaintiff comes into a court of equity and asks that exact, literal and mathematical justice, that most merciless of all things in the universe, be meted out to this defendant.

To what end?

To punish a fraud perpetrated upon this "poor, unlettered half-breed," and restore her property to her?

No, for it is admitted she was fairly dealt with, was satisfied with the transaction, and ratified and

confirmed it for a consideration after the adjustment of the scrip.

To right a wrong committed against the government?

No, for it received the scrip it had issued in return for the land it gave.

To protect the plaintiff from injury? No, for it admits that it has not been prejudiced, and if the land is restored to Eaton the government will return to plaintiff's grantor what it received from him.

To furnish a rule of construction for the future administration of the law?

No, for the law has served its purpose, is practically at an end as a living piece of legislation, almost the last piece of scrip has been located, and it is but little more than a memory on the statute books.

With no public policy to be subserved, then, with no private wrongs to be corrected, with no future interests to be guarded or protected, the plaintiff, nevertheless, comes into a court of equity and asks that the technical rules of the law be applied with literal and arithmetical accuracy, *because it is the law.*

But the law is not a conscienceless, cold-blooded, abstraction. It is not like a machine or a rule of mathematics that must always, and under all circumstances, work out the same result.

It is a practical science to guide and protect men in their daily affairs, and in the acquirement

and disposition of property. The *certainty* of the law is much more to be desired than its *accuracy*.

If Eaton, relying upon this custom which had been in vogue for more than a quarter of a century, used this scrip in this way, induced to do so because of the recognition of this custom by the only tribunal that was competent to pass upon it, he only did what all reasonably intelligent and honest men had done, and would do, under like circumstances.

And is he now, when this law is about to expire and become a dead letter, when no public or private good is to be subserved, to be punished and deprived of his property, and be made the *sole victim* of this law's entire administration, to the end that a court may declare, *as an abstract proposition*, what the correct construction of the law is?

Why, the law is not an *end*, but an *instrumentality*.

The abstract principles of the law are not maintained as barren idealities, but as practical standards to measure and regulate the rights of men.

Neither is the law administered upon principles of abstract right and mathematical certainty.

If the individual has violated the law, though unwittingly, and the failure to correct the error and apply the law will result in injury to others in particular, or the public in general, then must the individual suffer for the common good of all.

But the courts themselves will violate and defeat the law, where to uphold it will result in no good, and to defeat it will prevent harm and injury.

Did the court in Felix vs. Patrick apply the

inexorable rules of the law to the facts, as the mathematician would apply an algebraic formula to a problem, and let these rules work out their own result; making of itself a mere passionless, insensate, unthinking instrumentality through which to announce the result?

If it had, it would have said to the defendant, Patrick, this scrip and deed were obtained by your predecessor from this half-breed by fraud and without the payment of any compensation; as this was the method in which this scrip and deed were obtained, no title in either passed to the party so obtaining them; as no title passed to the party so obtaining them, no title passed to you; as no title in either scrip or deed passed to you, no title in the land acquired by them could pass to you. But, instead of forging and applying these iron links of logic, the court adopted the equitable rules of justice, common sense and reason. It said to the plaintiff Felix, technically you are entitled to this land. But at the time the instruments, through which it was secured, were obtained from your ancestor, this land was of mere nominal value. Today it is worth a million dollars, made so through no effort of your own.

It may be true as you say that you were not aware of the manner in which this land was obtained until recently, but years have elapsed, rights have grown up, and hundreds have relied upon the settled condition of the title to this land. To administer the law now, *as we find it,* and *as it is,* will result in infinitely more harm than good. The

letter of the law must fail; the principles, purposes and ends for which it was created must be sustained.

Not only is it in harmony with the rules of justice and reason, that where rights have grown up under a long continued and generally adopted practice, that those rights should not be overturned by a stringent application of the rules of law, but this doctrine is recognized by the courts and authorities as well.

Says Black on Interpretation of Laws, at page 216:

> "The best evidence of a contemporary construction of a statute, and of its universal acceptance, is a general usage, pusuant to such construction. Where the statute is of doubtful import on its face, great weight is due to such a usage, *and it will not be disregarded by the courts, unless there are very satisfactory reasons to induce them to such a course of action.* A very good illustration of the effect of usage, in this behalf, is found in an early case in Massachusetts. On the interpretation of certain Colonial laws of that state, giving to freemen the power to "dispose of" their lands, the court said: "Of these statutes a practical construction early and generally obtained that in the power to dispose of lands was included a power to sell and convey the common lands. Large and valuable estates are held in various parts of the commonwealth, the titles to which depend on this construction. Were the court now to decide that this construction is not to be supported, very great mischief would follow. Anl although, if it were now res integra, it might be very difficult to maintain such a

construction, yet at this day the argument *ab inconvenienti* applies with great weight. *We cannot shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is that long and continued usage furnishes a contemporary construction which must prevail over the mere technical import of the words.*"

The author then goes on to say:

"The 'usage' which is entitled to be considered in the construction of a statute is such as is practical, general and public. It may be the usage of the courts, in regulating matters of practice and procedure without formal decisions; *of the executive and administrative officers of the government, in the discharge of their duties;* of the legal profession generally, in advising their clients and conducting their business; *of the practical men of the community, in conforming their conduct and their contracts to the generally understood meaning of the law*; or of some or all of these combined. But it must not be merely theoretical or speculative." (Italics our own.)

As the defendant Eaton used this scrip, in common with thousands of others of his fellow citizens, in full reliance upon a custom so long continued and universally indulged in that the practice had come to be generally recognized and accepted as

right and proper, the court should not, at this day, apply the stringent rules of the law to his case, even though it believes that he technically violated the law, unless compelled to do so by some overruling consideration of public policy.

SUMMARY.

We, contend, therefore, that the Secretary erred upon both grounds upon which he cancelled the scrip locations in this case.

His position that the scrip was not properly located and should be cancelled, because the improvements were not made under the personal supervision of the scripee, and for her personal use and benefit, and because the land was not taken for her personal use and benefit, is untenable for the following reasons:

1. Because there is nothing in the act itself which requires the scripee to make the improvements for his own personal use, or to take the land for his own personal use, and such requirements by the Department would be an enlargement of and addition to the terms of the law and, therefore, invalid.

2. These requirements made by the Department as to the improvements to be placed upon unsurveyed lands, and the use to be made of the lands,

are in the nature of conditions precedent to the right to obtain the lands.

We contend that this construction of the law is unreasonable because, if congress had intended to require the performance of any acts as conditions precedent to the right to obtain the lands, the requirements would have been made as to surveyed as well as to unsurveyed lands.

3. Because an examination of the surrounding facts and circumstances and of the early circulars issued by the Department show, that the sole purpose in requiring improvements was to givie notice to prospective settlers that prior rights had attached to the lands.

We contend, also, that the Secretary erred in the construction which he placed upon the prohibitory clause of the act.

He maintains that its purpose was to prevent conveyances, or agreements to convey, prior to the location of the scrip.

If this had been the purpose, congress would have prohibited the conveyance of the *land* instead of prohibiting assignments of the *scrip*.

Furthermore, there were no reasons why congress should have prohibited the scripee from conveying the land, prior to the location of the scrip.

The reason assigned by plaintiff that it was because congress regarded the half-breeds as incompetent to take care of their own affairs is untenable, because, if they were incompetent they were

as much in need of protection after they located their scrip as before, and if congress had so regarded them it would have provided that they should not convey their lands either before or after the location.

This position of the plaintiff is also made untenable by the admission of counsel himself that many of these half-breeds were as intelligent as their white brethren, for it is inconceivable that congress incorporated this prohibitory clause in the act for the purpose of protecting incompetents, and yet made it applicable to competents and incompetent alike.

We contend further, that not only were there no reasons why congress should have prohibited conveyances of the land, but, that under the rules of statutory construction, no such interpretation can be given to the language of the act, even if that were its purpose.

The language of the act, as it stands, interpreted according to the ordinary meaning of the words used, accomplishes the lawful purpose of preventing the scripee from assigning to another the right to demand the title from the government; relieves the Department from the inconvenience and responsibility of determining to whom the scrip belongs when presented for location; avoids the possibility of a double redemption of the scrip by the government, and assures every scripee of the certainty of receiving the title to 480 acres of land, in his own name, no matter what means might be adopted to obtain an assignment of his scrip.

If the law accomplishes this, then it is not within the province of the courts to declare that there was some other and more important object that ought to have been accomplished, for this is a matter that is entirely within the discretion and control of the legislature.

Furthermore, the language of the act prohibiting assignments of the scrip cannot be interpreted as inhibiting conveyances of the land, for the reason that the courts have declared that there is a plain and well recognized distinction between the prohibition of the assignment of a right to land, and a prohibition against the conveyance of the land itself; and have held, as a rule of construction, that the courts will never declare that the legislature has intended to prohibit the conveyance of land, unless it be by the use of language so clear and explicit that there can be no possible doubt as to its meaning.

Again, the construction contended for by the Secretary and counsel is negatived by the fact that the act does not provide for any proof to be made that the scripee has not agreed to convey his land, prior to the location of the scrip.

It is inconceivable that congress should deliberately declare that these half-breeds should not agree to convey their lands until a certain time, and yet should permit them to receive the title to the lands, without requiring any proof whatsoever that no such agreement had been made.

Both the pre-emption and homestead acts prohibited the beneficiary from conveying his lands

until certain things required by those acts had been done, and the acts also required *sworn proof* to be made by homesteaders and pre-emptors that no agreement to convey their lands had been made.

It is only reasonable to assume, therefore, that if congress had any intention to prohibit these half-breeds from agreeing to convey their lands, until after the location of their scrip, that it would also have provided that proof of this fact be made, before issuing the title to them.

For the foregoing reasons we contend that the Secretary misconstrued the law and erred in cancelling the scrip locations.

But, conceding that the manner in which Eaton obtained the title to the land in question was in violation of the provisions of the Act of 1854, we contend, nevertheless, that there are three reasons why the scrip locations should not have been cancelled.

First, if Eaton was not entitled to the land Stram was. Even if it be conceded that Stram's attempt to convey the land to Eaton, prior to the location of the scrip, was in violation of the law, no penalty attached to such an act, and, consequently, Stram was entitled to retain the land if Eaton was not.

Therefore, even under the Secretary's theory of the law, the only thing that would have justified him in cancelling the location was to prevent the title from vesting in Eaton. But the records showed upon their face that Stram's attempt to convey

to Eaton was made before the location of the scrip; consequently, if the Secretary's construction of the law is right, an application of the law to the facts would show that Stram's attempted conveyance to Eaton was utterly ineffectual and that the title still remained in herself. There was, therefore, no warrant for cancelling the locations.

As Stram and her husband conveyed the land to Eaton in 1886, which was after the location and adjustment of the scrip, Eaton obtained the title through this conveyance, even if it be conceded that he did not acquire it by the conveyance under the power of attorney to Merritt.

Second, the Secretary erred in cancelling the locations, even if it be conceded that the use Eaton made of the scrip was in violation of the act, for the reason that the Department had decided in 1863, in the case of Felix vs. Carroll, that third persons could use Sioux half-breed scrip for the purpose of acquiring land for their own use and benefit, and not for the benefit of the scripee.

This decision had stood unquestioned, as the law of the Department, for over twenty years; Eaton and every one else, therefore, had a perfect right to rely on it, and it was inequitable and unconscionable to overturn it after such lapse of time, and after the people generally had acted upon it, even though, as an abstract question of law, the decision was wrong.

Third, the Secretary erred in cancelling the locations, even though it be conceded that Stram and

Eaton violated the law, for the reason that it appears from the records of the Department and the decisions of the courts that Sioux half-breed scrip had been customarily used in the same manner that Stram and Eaton used it, from the time it was issued in 1857, down to the time the decision in this case was rendered in 1889.

It also appears, from the action of the local land officials in the cases of Felix vs. Carroll, Allen vs. Merrill and Hyde vs. Eaton, that these officials not only believed it was the customary practice to handle this scrip in this way, but also believed that it was right and proper under the law to do so.

If this custom had prevailed generally for such a length of time that the people had come to recognize it as right and proper, and the land officials themselves had recognized it, there is no principle of law or equity that requires a court to take this land away from Eaton and his grantees, even though the court believes that he violated the technical provisions of the law, especially as no public or private interest would be subserved by it.

In conclusion, permit us to commend to the court a careful perusal of the concise, cogent and very able memoranda of Judge Moer, found at pages 86 and 275 of the record.

Counsel for plaintiff has dignified it with a large share of his attention, and we believe it will equally repay and merit the earnest consideration of the court.

We also call particular attention to the strong and comprehensive opinion of the Supreme Court of Minnesota, found at page 331 of the Record.

Respectfully submitted,

L. C. HARRIS,

C. A. TOWNE,

Counsel for Defendants in Error, Frank W. Eaton and Margaretha Lonstorf.

APPENDIX A.

Extract from brief of S. S. Burdett used on re-argument before the Secretary in the case of Hyde vs. Eaton:

In view of the request of the Secretary, contained in the order for re-argument of the scrip cases, that among other matters to be presented for consideration shall be "the practice of the Department prevailing relative" to Sioux half-breed scrip "prior to Secretary Vilas' decision in these cases," we exhibited that request to the Commissioner of the General Land Office to obtain his permission to examine the files of all the finally adjusted cases. Such permission was obtained, and thereupon an examination was begun and concluded, conducted by Mr. Frank A. Law, of the firm of Curtis & Burdett, and by Mr. J. W. Le Barnes and M. D. Brainard of the firm of Brainard & Le Barnes.

The examination included all the adjudicated cases (some four thousand in number) that had been finally passed upon, either favorably or adversely, to the scrip locations in the Department, and embraced the following land district:

Minnesota: Faribault (afterwards St. Peter), Henderson (afterwards Red Wing), Duluth, Minneapolis, Winnebago City, (afterwards Chatfield), St. Cloud, Taylor's Falls, Ottertail City, Alexandria,

Oak Lake (afterwards Crookston), and Redwood Falls.

Dakota: Vermillion, Bismarck, Grand Forks, Fargo, Devil's Lake, Aberdeen, Springfield, and Huron.

California: Marysville, San Francisco, Humboldt, Stockton, Visalia, and Los Angeles.

Nebraska: Dakota City, Omaha, and Beatrice.

Wisconsin: Bayfield, Eau Claire, La Crosse, Falls of St. Croix, Menasha, and Stevens Point.

Kansas: Topeka, Humboldt.

Utah: Salt Lake City.

Colorado: Fairplay, Denver, Pueblo, Del Norte, and Lake City.

Nevada: Carson City.

Illinois: Springfield.

Indiana: Indianapolis.

Montana: Bozeman.

New Mexico: Las Cruces.

Michigan: Ionia and Marquette.

Washington: Spokane Falls.

Other locations, but few in numbers, made at the Helena and Miles City offices, Montana; Tucson, Arizona; Devil's Lake, Dakota; North Yakima and Seattle, Washington; Cheyenne, Wyoming; and Garden City, Kansas, are still pending for adjudication, and for this reason were not embraced in the examination.

In the examination so made, especial care was taken to ascertain whether, during the period prior to the decision of Secretary Vilas, any case had

arisen exhibiting like facts to those in the cases at bar, and as to what had been the practice or the rulings of the Department with respect thereto. Such cases were found and will be cited. None were found which sustained the view taken by Mr. Secretary Vilas.

Care was also taken to ascertain whether, during such period, any ruling of the Department had been made adverse to the position advanced by these scrip claimants as to the effect of the adjustment of the locations to the public surveys. No such decision was found; on the contrary, numbers of cases illustrating that phase of the pending cases were discovered, and instances of them will be referred to. In all of them the contention we have maintained is borne out and that of Mr. Secretary Vilas negatived.

I have here some abstracts, which show the result of that examination of cases in the General Land Office. I will read the explanatory note at the head. Synopsis of the result of the examination in the General Land Office of individual Sioux half-breed scrip locations, made at the various land offices of the United States, beginning with the year 1859 and continuing down to the present time, embracing—

First. Locations upon surveyed land, when made either by the scripe in person or by attorneys-in-fact, have proceeded regularly to patent uniformly without objection, save where some one claimed a superior right in the land by virtue of a

prior claim, or where it was shown that at the date of location the scripee had died.

Second. Two classes of personal locations upon unsurveyed lands exist; first, those where the location was made by the scripee in person, without any improvements being shown as a basis of the right to a patent; and, second, locations made by the scripee in person where improvements were shown to have been made prior to the adjustment of the scrip to the lines of the public surveys. These two classes have uniformly passed to patent without objection by the United States or otherwise, as far as the records disclose.

Third: There are also two classes of locations upon unsurveyed lands made by attorneys-in-fact, to-wit, those where no improvements were shown to have been made upon the land prior to the survey or at any other time, and those where improvements were shown to have ben made before the survey and the adjustment of the scrip after survey. These two classes of locations seem to have passed regularly to patent without objection to the time when Commissioner Sparks raised the question in the Stram case that is now under discussion. Hundreds of locations of these various classes have been examined where the patents duly issued, the examination covering locations made at various periods between 1859 and 1885, and in some of them the patents issued as late as 1886 or 1887. In no case has a decision by the Department been found which disputed

the right of the scripee to a patent, either in locations upon unsurveyed or surveyed lands, and whether improvements were or were not shown where the record did not show a superior prior adverse claim. In the examination especial care has been taken to discover, if possible, any decisions of the General Land Office or of the Secretary of the Interior bearing upon this question, and none have been found adverse to the scrip locations. If the question was ever raised against any of the unsurveyed locations, that the improvements were not shown to have been made by the Indian and for his personal use and benefit, it seems to have been resolved as a matter of course in favor of the location, without any formal decision upon the question.

The following cases presenting special features are submitted as suggestive of the uniform practice of the Department in such matters:

INSTANCE OF THE FIRST CLASS.

Hundreds of locations made in the various land offices of Minnesota, Dakota, Nebraska, California, Nevada, Colorado, New Mexico, Wisconsin, and other land offices of the country.

INSTANCES OF THE SECOND CLASS.

Bismarck, Dakota.—R. & R. No. 1, and R. & R. No. 3, Bismarck. Locations by administrator upon unsurveyed land and improvements shown. Duly patented in August and December, 1882.

San Francisco, California.—R. & R. Nos. 107, 115, and 120. Locations upon unsurveyed land, adjusted February 11, 1867, and duly patented August 10, 1867. No improvements hown.

Of the third class the special cases of locations upon unsurveyed lands by attorneys, wherein improvements were shown have already been adverted to. The case of locations upon unsurveyed lands where no improvements whatever were shown, and wherein the original locations upon the unsurveyed tract and the adjustment to the public surveys were made by attorneys, are as follows:

Bayfield District, Wisconsin.—R. & R. Nos. 4 and 5. Locations on unsurveyed lands March 1, 1858; adjustments March 28, 1859, and duly patented.

Marysville, California.—Scrip 38, R. & R. No. 12 and 214, E. R. & R. No. 11. Locations upon unsurveyed lands April 24, 1865, by attorney, and adjusted October 31, 1865. Locations duly patented.

San Francisco, California.—R. & R. No. 71 to 98 inclusive; 28 in all.

All these locations were made upon unsurveyed lands December 24, 1866, and were adjusted to the public surveys February 11, 1867. No improvements whatever were shown.

Wm. S. Chapman acted as attorney for the scripees in all the cases. Patents duly issued August 10, 1867, and were delivered to attorneys of this city who represented the attorneys before the Land Department.

R. & R. 100, 101, 102, 103, 104, 108, 109, 110, 112, 114, 116, 117, 118, 119, 121, 122, 123, 124, 126, 127, 128 and 129.

All these locations were made on unsurveyed land in 1866, by Wm. S. Chapman, as attorney-in-act for the scripees, and were adjusted to the public surveys on February 11, 1867. No improvements whatever were shown. Patents duly issued August 10, 1867, and were delivered to attorneys in this city.

Mr. Mullan. Have you the names of those attorneys?

Mr. Burdett. Yes, sir.

Mr. Mullan. Please give them to the Secretary.

Mr. Burdett. It is quite immaterial. Messrs. Britton & Gray were the attorneys.

The following locations were made at the Indianapolis, Indiana, land office March 5, 1874, by attorneys in fact, upon unsurveyed lands; were adjusted to the public surveys by the said attorneys-in-fact February 8, 1876, and were all patented on March 1, 1877. No evidence of improvements was offered or required.

Scrip 524, D, Lucy A. Wells, R. & R. No. 3. Power of attorney dated May 11, 1871, to George B. Wright. 567 E, Josette Moutre, R. & R. No. 4. Power attorney dated January 23, 1867, to William S. Chapman.

582 E, Philamon Provincial, R. & R. No. 5. Power of attorney May 1, 1869, to T. B. Walker.

565 C, Joseph Moutre, R. & R. No. 6. Power

of attorney to Wm. S. Chapman, January 23, 1867.

416 E, RR. & R. No. 8, Eliza Laframboise. Power of attorney April 7, 1873, to John S. Newman.

398 D., R. & R. No. 9, Anthony Renville. Power of attorney, January 10, 1874, to John S. Newman.

There were also made at the same time in the same way the following locations, which were cancelled for the reasons hereinafter stated:

Scrip 203 C, R. & R. No. 7, Hannah Grignon. Location cancelled April 7, 1877, because it was shown that the scripee died before the power of attorney was given.

65 D. R. & R. No. 10, located by J. B. Bassett. Cancelled April 7, 1877, because a duplicate of the scrip had been previously located and patented.

Scrip 595 D, Amanda Brown, located February 13, 1871, on surveyed land in the Salt Lake City District, Utah, by Robert Nagler as attorney-in-fact under a power of attorney dated January 19, 1867.

There was no affidavit of improvement in this case. On February 13, 1871, the attorney-in-fact made affidavit, saying:

"I have located Sioux half-breed scrip 595 D, issued to the said Amanda Brown for her sole use and benefit, and that the said Amanda Brown is now living, to the best of my belief."

The said attorney-in-fact also filed with the scrip an affidavit of J. F. Smith, dated February 13, 1871, which showed that he (Smith) had surveyed the land for "Robert Nagler, as attorney-in-fact for

Amanda Brown, and that the said tract of land is subject to pre-emption." The attorney-in-fact also filed a plat of the land, which had marked thereon two saloons and another building described as "Nagler's saw-mill."

The scrip was after the survey adjusted to the public surveys, to-wit, on August 28, 1871, and the location was duly patented January 3, 1873.

It is quite evident in this case from the plat that the improvements upon the land belonged to Nagler, the attorney-in-fact.

Scrip 95 E, of Mary Hudson.

The application in this case was signed Mary Larose, formerly Mary Hudson, by her husband, Octave Larose, and the location was allowed on this application March 1, 1864, at the Carson City land office, Nevada, W. S. Chapman presenting it without any authority except said application. Afterwards, on June 2, 1864, Mary (Hudson) Larose and her husband ratified the action of the husband and Chapman and the entry was patented.

Now in reading this sort of thing I desire that there shall be no mistake about it. We want it fixed beyond all controversy that we stand upon the adjudications and the uniform practice of the Department—not a new practice, but a practice of more than thirty years past.

But I will go on a little further.

Scrip 321 D, of Margaret Gohin.

Located September 29, 1883, on unsurveyed land at the Creelsburg (now Devil's Lake), Dakota,

land office, by Calvin S. Uline, as attorney-in-fact, under a power of attorney dated July 12, 1883.

Uline adjusted this location to the public surveys October 11, 1883. The entry was approved for patent February 27, 1885, and patent issued March 16, 1885.

As to evidence of improvements we have the affidavit of Uline dated February 11, 1883, in which he said:

"By virtue of letter of attorney hereto attached, I have, for the purpose of locating Sioux half-breed scrip 321 D for a hundred and sixty acres, made or caused to be made, the following improvements upon the lands described as follows, to-wit: N. W. 1-4 of Sec. 27, Tp. 154, R. 64, according to the Government survey, one frame dwelling house, value $175, size 10x12 ft., and 10 acres of breaking."

Cases in the Humboldt Land Office, Kansas.

412 A, Julia Laframboise. Power of attorney, August 5, 1864, to John J. Barnes.

Scrip located by said Barnes on unsurveyed land May 15, 1868. The name of the scripee only is signed to the application, but it is evidently not the handwriting of said scripee.

J. J. Barnes, the said attorney, died, and on December 9, 1868, A. S. Barnes and James I. Barnes were appointed his administrators by the probate court of Cherokee county, Kansas.

On October 19, 1869, S. J. Barnes, as administrator of J. J. Barnes, deceased, adjusted the scrip to the lines of the public surveys.

On December 22, 1869, the said S. J. Barnes made affidavit before the Register in which he alleged that he was administrator of the said J. J. Barnes, deceased, who was agent for Julia Laframboise, and that the latter was an applicant to purchase the S. E. 1-4 of N. E. 1-4 of Sec. 2, Tp. 35 S., R. 24 E., and that she had made the following improvements on said land prior to May 1, 1867, and had a personal residence on said land by her attorney to the time of his death (November 18, 1868); also by the administrator of said estate up to the present time, having built a house 14 x 16 feet, a stable, and 4 acres fenced and under cultivation.

The affidavits of Joel Brewster and Wm. Higby were also filed, in which they say:

"We know that J. J. Barnes, agent for Julia Laframboise, settled on the land about May 1, 1867, by building a house thereon 14 x 16, one story high, shake roof, 2 doors and 2 windows, built a stable, and plowed and fenced about 4 acres of said land. That said agent lived upon said land and in the said house up to the time of his death, which occurred November 18, 1868 that the administrators has had a continuous residence thereon up to the present time."

On June 9, 1870, the Commissioner suspended this location and informed the Register and Receiver that S. J. Barnes had no authority to locate the scrip, and therefore directed that a proper call be made upon the scripee for her sanction of his action. In compliance with this requirement, on June 1,

1870, the said scripee executed a paper in which she said:

"I do hereby certify that I have given my consent and do acquiesce in the adjustment of my Sioux half-breed scrip 412 A to the following description, to-wit, the S. E. 1-4 of N. E. 1-4 of Sec. 2, Tp. 35 S., R. 24 E., in the district of lands subject to sale at Humboldt, Kansas, containing 40 acres, according to the official plat thereof. I do hereby certify that I have located and caused the same to be occupied up to the present time by my attorney and his administrators, and do hereby request that a patent be granted to me for the same."

Upon the filing of this affidavit the location was approved for patent July 5, 1870, and patent issued July 12, 1870.

This was not a case that was merely passed. It was a case of investigation in the General Land Office, and those facts were developed, and those results were reached, and it is precisely in accord and in order with the whole usage of that office from the first.

Scrip A, R. & R. No. 2, James Renville. Power of attorney to John J. Barnes May 9, 1863. Located by the said J. J. Barnes, May 15, 1868, upon unsurveyed lands. Adjusted October 19, 1869, by S. J. Barnes, administrator of the said J. J. Barnes, to the N. E. 1-4 of Sec. 2, Tp. 35 S., R. 24 E. No improvements whatever were shown. The location was not suspended, but was patented May 12, 1870.

391 C, R. & R. No. 3, James Renville. Power

of attorney May 9, 1863, to John J. Barnes. Located by said Barnes May, 1868, on unsurveyed land. Adjusted October 19, 1869, by S. J. Barnes, administrator of said J. J. Barnes, on the N. 1-2 of S. W. 1-4 of 1, 35 S., 24 E. No improvements whatever were shown. The location was not suspended, but went regularly to patent May 12, 1870.

Scrip 320 D, R. & R. No. 1, of Cecelia Demarais. Power of attorney January 1, 1864, to James W. Henderson.

January 26, 1865, the said attorney-in-fact located the scrip on unsurveyed land and filed his affidavit, where he said:

"I, Cecelia Demarais, by my attorney-in-fact, James W. Henderson, do solemnly swear that I have settled upon and improved the land upon whica I have located Sioux half-breed scrip No. 320 A for 40 acres, 320 B for 40 acres, and 320 C for 80 acres, to-wit: S. E. 1-4, S. W. 1-4 of 25, S. E. 1-4 of S. W. 1-4 of 24, and S. 1-2 of S. E. 1-4 of 24, 1 S., 3 W., said improvements consisting mainly in enclosing said tract by fencing the same with substantial posts and wire fence.

"Cecelia Demarais, by her duly authorized attorney, J. W. Henderson."

Then follows the jurat of the officer before whom the affidavit was executed on May 6, 1865.

August 31, 1865, the scrip was adjusted to the public survey to the S. E. 1-4 of S. W. 1-4 of 25, S. E. 1-4 of S. W. 1-4 of 24; and S. 1-2 of S. E. 1-4 of 24, 1 S., 3 W., Humboldt meridian.

Patent duly issued November 26, 1866.

Scrip 320 A and 320 C of the same party, located in the same way, the proofs being the same as in 320 B.

108 D, Josephine Laterville, R. & R. No. 4. Power of attorney August 6, 1864, to James W. enderson. Located the scrip on unsurveyed land on January 26, 1865.

"John A. Sims, attorney-in-fact for Peter Bouiere and Blue Hair Bouiere."

This is sworn and subscribed in the usual manner.

There is one more which I am told gives another phase, a specimen; not particular cases standing alone, but these are specimens of many cases.

R. & R. No. 137. Duluth, Minnesota.

Scrip No. 343 D, for 160 acres, issued to Joseph Coursalles, November 24, 1856.

Power of attorney from Joseph Coursalles to Benj. F. Bull, dated September 25, 1865.

Located by Benj. F. Bull, attorney, May 1, 1870. Lands described as in Tp. 54 N., R. 23 W. Changed to 55 N., 22 W.

Located on described lands in Tp. 55 N., R. 22 W., March 28, 1873.

Evidence of improvements:

Affidavit by John Martin, March 28, 1873, that he made personal examination of the land March 20, 1873, "and there was no person living on the same at that time, nor were there any im-

provements on it except those of Benjamin F. Bull, attorney-in-fact."

Whether there were any of those there deponent did not say.

Duluth, Minnesota. Joseph Campbell, location in section 31 and 32, of township 65, range 2 E.

Adaile Gammel, by her attorney-in-fact, offered her Sioux half-breed scrip, 188 A, March 18, 1874, for lot 4 of 32, 65, 2 E, the same being then unsurveyed.

On September 15, 1874, Campbell by his attorney-in-fact, offered his scrip for location upon said lot in connection with others in section 31. On October 7, 1876, the said attorney adjusted Campbell's location so as to include the said lot 4 of section 32.

A contest resulted between these two applicants, and a hearing held at the local office. From the testimony adduced it appeared that Gammel had made no improvements on the land, while Campbell had, prior to his location, purchased improvements of one McFarland, consisting of a house, and that McFarland occupied the house up to and subsequent to the location.

The local oficers, on September 22, 1877, upon this state of facts, held that as Gammel's location antedated that of Campbell that it should be pre-

"It is true the filing of Gammel was not strictly legal, that is, the law was not fully complied with, because there is no evidence of improvement

or formal acknowledgment of the filing by the then Register and Receiver of this office. But I think it is fair to presume that Gammel's attorney-in-fact, Hamilton, did all that was required of him by the Register and Receiver, and that those officers, not Hamilton, are really to blame for any omission, for they are supposed to know the requirements of the law, and it was certainly their duty to reject the application to file before all the requirements were complied with." (Secretary's circular of January 29, 1872; pp. 723, 724, Copp's Land Laws.)

The local officers therefore held that Campbell should not be allowed to include in his location the said lot 4 of 32 claimed under the Gammel location, and on October 19, 1877, the then Commissioner affirmed this decision of the Register and Receiver.

After this decision was rendered, Henry F. Masterson, attorney for Campbell, asked leave to amend his location so as to take in place of lot 4 of section 32, the N. E. 1-4 of S. W. 1-4 of 31, making in all 172-10 acres. On October 27, 1877, the Commisioner directed the local officers as follows:

You will call upon Mr. Masterson to write across the face of the application a correct description in red ink of the tracts he now desires to locate, and affix his signature thereto. Thereafter on receipt of the excess purchase money required

by law you will certify to the correctness of such location, and transmit the papers to this office. This was done and patent subsequently issued upon the location.

But I have already occupied more of the alloted time than is properly my due and must surrender the floor.

APPENDIX B.

Department of the Interior,

Washington, March 27, 1863.

Sir:

I now return to you the papers submitted with your report of the 20th inst. upon the appeal of S. A. Peugh, attorney, representing the title of Sophia Felix, from your decision of the 15th December, 1862, against the location made by her on the 21st November 1861, of her scrip No. 181 A. and No. 181 C. upon the N. 1-2 and S. E. 1-4 of the S. E. 1-4 of Sec. 9, Tp. 15 N., R. 13 E., Omaha district, Nebraska, and in favor of the pre-emption claim of M. W. Carroll, under a settlement commenced December 29, 1861.

The location of Felix is anterior to the pre-emption settlement and if valid should be patented. It is plain from the decision of this Department of July 30, 1862, and is conceded by your office, that the land was subject to location on the 21st No-

vember 1861, but you decide against the location for these reasons:

1st. Felix was not a resident upon the land and had no improvements thereon at or before the date of location.

2nd. That "the location of the scrip, although made in her name, was not made by her in person, nor by her guardian or duly authorized agent for her use and benefit, but by an unauthorized person, and for the use and benefit of a person having no legal interest therein."

The law under which Felix claims, is that of the 17th of July, 1854 (Stat., Vol. 10, p. 304), which provided for an exchange of lands with the Sioux half-breeds for the tract lying on the west side of Lake Pepin. Sophia Felix was one of the half-breeds, and received her scrip regularly through the officers of the Indian service;—and the law provides that such scrip "may be located upon any of the lands within said reservation not now occupied by actual and bona fide settlers of the half-breeds or mixed bloods or such other persons as have gone into said Territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands, not reserved by Government, upon which they have respectively made improvements, etc."

The land located by Felix is not within the reservation—but it had been surveyed, and was

subject to pre-emption at the date of location, and was unoccupied by an adverse claimant. I therefore deem the location to be good. The law uses the disjunctive conjunction, in the paragraph quoted, and it is in the cases where unsurveyed lands are claimed by a half-breed that improvements are requisite as an antecedent to the right of location, and I therefore, do not regard your first objection to Felix's claim as sanctioned by the law.

As to your second objection, I remark that this kind of scrip is by the law, declared to be not assignable. In this case Sophia Felix has signed the application to locate her own scrip. The signature must be treated by us as genuine, when there is no proof to the contrary; and when she has made no complaint against this use of her scrip. The fact that the scrip was carried to the Land Office and the business transacted by another person, does not affect the validity of her entry of the land.

As the certificate of location issued in her name, and the patent will issue to her, neither the Register's report or the affidavit of third parties can be admitted to establish the interest of any other person in the location.

We could not recognize such interest if an assignment in writing was produced, and duly proved to have been executed by the half-breed—whether she could sell or did sell the land after the location of her scrip we need not inquire, and the validity and effect of any such sale or assignment

must be left to the arbitrament of the Courts of Law. The location is valid on its face, and the owner of the scrip, so far as she is represented at all, demands the patent to issue in her name, and my decision is that she is entitled thereto.

The subsequent and interfering claim of Carroll must be rejected. The Secretary of the Interior directs me to advise you of these conclusions of the Department in this case.

I am Sir, Very Respectfully,

Your Obedient Servant,

W. T. OTTO,
Assistant Secretary.

The Commissioner of the General Land Office.

SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, A. D. 1901.

NO. 80.

THE MIDWAY COMPANY,
Plaintiff in Error,

vs.

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN and MARGARETHA LONSTORF,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR—MERRILL M. CLARK, RICHARD H. FAGAN and LEONIDAS MERRITT.

Statement of Facts.

In 1830, the Government of the United States entered into a treaty with the Sioux Indians, by the terms of which large tracts of territory were ceded to the government. By virtue of the ninth article of this treaty, the Sioux Indians were per-

mitted to bestow upon the Sioux half-breeds or mixed bloods a tract of land out of the territory, theretofore held by them, fifteen miles wide by thirty-two miles long, lying along the north westerly shore of the Mississippi River and Lake Pepin, in the territory of Minnesota, and a few miles southerly of the city of St. Paul. This treaty will be found in the 7 Statutes at Large, page 330. Shortly afterward the Sioux half-breeds removed to this reservation and in the main, continued to reside there until 1854. In 1854, the Congress of the United States passed an act which took effect July 17, of that year, whereby the president of the United States was authorized to exchange with the half-breeds or mixed bloods of the said Sioux nation, who were entitled to an interest therein, for the said tract of land which was set apart to them under the said ninth article of the treaty, and to cause to be issued to such persons, upon execution by them to the United States of a relinquishment of all their right and interest in and to said reservation, scrip or certificates for the same amount of land which each of them would be entitled to in case of a division of said reservation, which certificates or scrip it was provided in the act, should be subject to location, among other, upon any unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands, not reserved by government, upon which they have respectively made improvements. The act will be found in the 10 Statutes at Large, page 304.

The principal features of this act, it may be noted, are as follows: That upon the relinquishment by the half-breeds of their interest in the reservation, the government would issue to each half-breed certificates or scrip for an amount of land equal to his interest in the reservation, which land was to be selected by the half-breed out of any part of the public domain open to settlement or not otherwise appropriated or reserved; in effect a conveyance in severalty of such amount of land so to be selected; these certificates or scrip being provided in order to identify the half-breeds and inform the land officials who were entitled to receive land under the terms of this act, and each piece of scrip issued under the said provision contained the name of the half-breed to whom it was issued and stated the number of acres he was entitled to receive.

The land officials to whom the carrying out of the act was entrusted, determined that each half-breed was entitled to 480 acres, and there was issued to each half-breed five pieces of scrip, two pieces for forty acres each, one piece for eighty acres and two pieces for one hundred and sixty acres each.

The act provided that the half-breed might take either surveyed or unsurveyed land, but in case he selected unsurveyed lands, some improvemnts were required to be placed upon the land, the nature and character of which were not prescribed. The act did not require either residence upon or cultivation of the land by the half-breed. When

the scrip was located upon unsurveyed land, the scrip was surrendered and filed in the local land office, the same as on surveyed lands, and the location was described by metes and bounds. After the lands had been surveyed, the scrip was adjusted to the surveyed lands and the lands entered given their proper designation of sub-division, section, town and range. The act contained no prohibition against the *transfer or conveyance of the land*, but provided that "no transfer or conveyance of any of said certificates or scrip shall be valid."

The first circular of instructions in regard to the location of this scrip was issued March 21st, 1857, and will be found in First Lester's Laws, 627. This circular required that the "land selected in satisfaction of a certificate or scrip, must be located in the name of the party in whose favor the scrip is issued and the location may be made by him or her in person, or by his or her guardian or duly authorized agent." This circular indicates, as the fact was, that many of the persons entitled to land under this act and in whose name scrip was issued, were then minors.

Orillie Moreau, afterwards married to Stram, was a beneficiary under this act, and to her scrip was issued by the authorities for 480 acres, certificate No. 19 D, for 160 acres, being one of the pieces of scrip so issued to her. No question is made as to the validity of her certificates.

On the 25th day of May, 1883, Orillie Stram and husband executed to Leonidas Merritt, a pow-

er of attorney to enter into and take possession of any and all pieces or parcels of land in the State of Minnesota which they then owned or of which they might thereafter become seized, or in any way interested in under and by virtue of the location of Sioux half-breed scrip No. 19 D for 160 acres, issued pursuant to said act of July 17th, 1854, to Orillie Moreau, then Stram, and authorized said Merritt to sell and convey said land (page 189 Transcript). At or about the same time, a power of attorney was executed to Frank W. Eaton, authorizing said Eaton to locate said scrip for and in the name of Orillie Stram, and to do all acts necessary to secure a permanent and bona fide location of the scrip. Reference to these powers is made in the deed shown at pages 183 et seq. of transcript.

It is claimed and perhaps may be admitted that when these powers were delivered, or at least one of them, the name of the donee in the powers was blank, but we will consider this later on. These powers of attorney were made to carry out an agreement which Eaton had made with Stram for the purchase of the land to which she was entitled, and to facilitate the entry, selection and conveyance thereof. A part of the purchase price was paid when the agreement was made, and the balance was to be paid "after the location was perfected and the scrip adjusted" (Transcript Fol. 340).

On June 16th, 1883, Eaton, acting under said power of attorney, located the scrip 19 D, in the name of Stram upon unsurveyed lands of the Unit-

ed States, by metes and bounds, which, after the lands were surveyed, were described, as Lots 3, 5 and 6 and the southeast quarter of the northwest quarter of section 30, in township 63 north, of range 11 west, and caused improvements to be made upon said lands, among other, a house to be constructed 14x16 feet, with floor, roof, door and window, bunk and table (pages 117-118 Transcrip). The scrip was received and the entry allowed and the character and fact of the improvements established to the satisfaction of the land office authorities (see pages 166-169 Transcript). On July 20th, 1885, the maps of the survey of the township were filed in the land office, and upon the next day, upon the application of said Eaton, acting in the name of and under the power of attorney from Stram, the scrip was adjusted to the surveyed lands (see Fol. 510-512 of Transcript for application to locate and adjust the scrip upon the surveyed lands, and Fol. 513 for certificate of local land officers as to adjustment). After the scrip was located and the entry allowed, Merritt conveyed the land, acting under his power of attorney, conveying a seven-ninths interest to Eaton and the residue to other parties by Eaton's direction, and to the title and rights thus obtained, the defendants succeeded by mesne conveyances in the following proportions: Frank W. Eaton 13-36, Merrill M. Clark 9-36 and Margaretha Lonstorf 8-36 and Richard H. Fagan 6-36. This fact is admitted on the record (see Fol. 297 and Fol. 94 and 99 of Transcript).

On the 20th day of July, 1885, one Thomas W. Hyde applied to make pre-emption filing for Lots 5 and 6 and the S. E. 1-4 of the N. W. 1-4 of said section, which application was rejected by the land office authorities as conflicting with the scrip location of Orillie (Moreau) Stram. Hyde afterwards made allegations in support of his offered entry, that the scrip location was invalid because the half-breed had never been upon the land and because the improvements made thereon were not made by her or under her supervision and claimed that he had settled on the land in 1884. In support of the charges thus made he filed a paper purporting to be an affidavit made by the scripee in 1884, in which she denied having made the power of attorney to Eaton, and denied having authorized him to make the improvements on the land, altho' the scrip entry had been allowed on the unsurveyed and adjusted to the surveyed land. A hearing upon the Hyde attack was ordered which was had April 6, 1886. Between the date of the complaint and the date of the hearing the scripee and her husband executed a deed of confirmation to said Eaton acknowledging, ratifying and confirming all that Eaton had done and reciting, ratifying and confirming the conveyances which had been made by said Merritt as the attorney in fact of said scripee, and further containing a new conveyance of the land or of 7-9 thereof to said Eaton (see Exhibit B., pp. 81 et seq. Transcript). This the scripee had in the beginning agreed to do (Fol. 336 Transcript). The result of the hearing was that

it was and has ever since in all successive appeals been held that Hyde's attempted entry was fraudulent and void and all rights have always been denied him, and all recognition of any rights enuring to him denied both by the land department, from the lowest to the highest official therein, and, as well, by the courts.

A reference to the following decisions in cases which have arisen mainly between the subsequent applicants for these lands, will verify this statement.

Hyde vs. Eaton, 12 L. D., 156.
Hyde vs. Warren, 14 L. D., 576.
Same case on review, 15 L. D., 415.
Bishop Iron Co. vs. Hyde, 66 Minn., 24,
Hyde vs. Bishop Iron Co., 177 U. S., 281, L. Ed. 771.

The local land officers upon the hearing found the facts substantially as out-lined, referred to the two powers of attorney, found that the scripee had never asked to have the location set aside, but, on the contrary, had executed and delivered a deed ratifying and confirming all that had been done; found specifically that "there is nothing in the evidence to show that this scripee was misled or imposed upon by the defendant or his agents," and held that the location was effected in strict conformity with the usual and accepted practice and sustained the same (Fols. 195-199, Transcript).

The scripee herself never appeared to ques-

tion the entry, nor any act that had been done under her powers of attorney, nor was she called as a witness, and there is sufficient in the record to show that the affidavit which had been obtained from the scripee had been secured by some imposition upon her by Hyde or his attorney, who had made a corrupt agreement with him, but this wrong was righted by the deed of ratification.

Hyde appealed to the Commissioner of the General Land Office who sustained all of the findings of fact of the local land officers, but decided against the scrip locations, solely because the scripee had not seen the land or improvements and *because the circular of instructions from the Department required the Indian to have direct connection with the land* pp. 70-72 of Transcript). From this decision, appeal was taken to the Secretary of the Interior, who affirmed the decision of the Commissioner and stated at length the grounds of his decision (pp. 72-74, Transcript). Hyde was disposed of as being without rights in the land and as being guilty of fraud (pp. 74-81, Transcript).

The decision of the Secretary was not reported in as much as on the same day he decided the case of Allen vs. Merrill which is reported in the 8 L. D., 207, in which latter case involving almost the same questions, his reasons are given more at length than in the case of Hyde vs. Eaton, the decision in which case can be found at page 63 of the Transcript.

The result of the Secretary's decision was to throw the land open to entry to other parties. Then

commenced the scramble by sundry speculators and their representatives, including the plaintiff in error, or those under whom it claims, and the continued scramble has furnished considerable business both for the land department and for the courts; one Frank Hicks having been permitted to locate said Lots 3, 5, and 6 with scrip, under whom the plaintiff claims, and to whom the same was patented, and one Emil Hartmann having been permitted to scrip the S. E. 1-4 of the N. W. 1-4 of said section to whom the same was patented and through whom the plaintiff claims. But in none of these proceedings which culminated in the issuance of patents in 1898, to the plaintiff's predecessors and grantors, were these defendants or their predecessors parties or participants, but they have ever stood upon their rights and asserted their ownership under the scrip location. It is admitted that this plaintiff and its predecessors had full knowledge of the rights of these defendants (Fol. 303, Transcript).

When these various parties had fought each other to a finish, it was still necessary to determine the rights of the scripee and those claiming under her, these defendants. This action was brought for that purpose, the complaint being the ordinary one used in such actions for the determination of adverse claims. The answers, however, not only deny the rights of the plaintiff, but are substantially bills in equity which set out at length and in detail all of the proceedings in the land department, allege that the decision of the Secretary was in viola-

tion of the rights of the scripee and those claiming under her, contrary to law and to the established and uniform practice of the land department since the passage of the Act of 1854, and ask that the plaintiff be declared to be the holder of the legal title in trust for the defendants.

The question of innocent purchasers does not arise in the case and it was freely declared on the trial that there was no question of fraud or bad faith on the part of Eaton in his dealings with Stram; that he had no intention of evading the provisions of the Act of 1854, but believed that in what he did he was acting within his rights and in accordance with the law. The only question is whether, under the law and under the facts as established, the Secretary's decision, cancelling the scrip location, was right or wrong, plaintiff's position being that Eaton misconstrued the purport of the law and misconceived what his rights were thereunder. These defendants had patiently and confidently waited for the contentions of the various parties seeking this land to reach that point where an action of this kind would lie, and but for the fact that the plaintiff brought the same with reasonable promptness, these defendants would have brought such an action. Hence they welcomed its commencement, tendered fully the whole issue, and upon the trial were awarded a judgment decreeing them to be the rightful owners of the land and that such bare legal title as might be held to have passed by the patent was held in trust for them as such owners and that they were entitled

to a conveyance thereof from the plaintiff, and that upon failure of the plaintiff to so convey the premises, a certified copy of the judgment, when recorded in the office of the Register of Deeds, should operate to transfer the same (pp. 51-62, Transcript).

The District Court of the 11th Judicial District of Minnesota, before which the case was tried, thus overturned the decision of the Secretary, held that the location of the scrip was valid and that the equitable title to the land was vested in the defendants. For memorandum opinion of the trial court, filed in connection with the findings (see pp. 86, 275 of Transcript).

A motion for a new trial was denied, judgment was entered pursuant to the findings and an appeal was taken to the Supreme Court of Minnesota from the order denying a new trial and from the judgment (see Transcript, pp. 273-275 for motion and order, pp. 302-305 for judgment, and p. 306 for appeal).

The appeal was argued April 25, 1900, (Fol. 371 Transcript). The decision of the trial court was affirmed in all respects and judgment entered accordingly May 29, 1900, (Fol. 369, Transcript). June 2nd, 1900, the plaintiff sued out a writ of error to this court. (See p. 344 Transcript for petition and p. 350 for allegations of error). The decision of the Supreme Court of Minnesota may be found on pages 330 et seq. Transcript.

The foregoing statement of the case is made because at the time we are required to prepare this brief we cannot know what statement of facts will

be made by the plaintiff in error. In no previous briefs in behalf of the plaintiff has there been, in our view, a fair, correct or complete statement of facts made.

ARGUMENT.

I.

Outline of Issues Involved.

The finality of the decision of the Secretary of the Interior of February 18th, 1889, is on trial in this case.

If that decision, upon the facts established in the record rests upon an error in the construction of the law or upon a mistake of fact, as conclusively shown from such record, resulting in granting a patent to a wrong person, the person aggrieved may have resort to the courts to redress the wrong.

James vs. Germania Iron Co., 107 Fed. Rep., 600.

The power of supervision lodged in the Department is not unlimited or arbitrary and cannot be exercised so as to deprive any person of land lawfully entered or paid for.

Germania Iron Co. vs. James, 89 Fed., 818.

Clerk Land Dept.

The finality and correctness of this decision has never been an issue in any cause until this action was brought. We believe the Departmental decision is clearly erroneous and that it and those cases since decided in the Department on the strength of it, stand here unsupported by reason or authority.

The trial court overturned the decision of the land department and inthis was sustained by the Supreme Court of the state. We believe the decisions were right and in harmony with prior decisions of the latter court and with the decisions of the honorable court which is now to finally pass upon the same. That any other conclusion would have been a travesty on justice and inconsistent with the law involved and the proper construction thereof, with a long course of judicial and departmental determination, and in total disregard of vested rights of many years standing.

The case of the plaintiff in error rests upon the correctness of the decision of the Secretary of the Interior. As we understand it, the contention of the Secretary and of the plaintiff is that the scrip location was invalid for two reasons:

1. Upon the unsurveyed land because the land office circular of January 29th, 1872, required the improvements to be made "by or under the personal supervision or direction of the Indian," and that they must be "for his personal use and benefit," and that the Indian must have "a direct connection with the land," and claim the same "for his per-

sonal use." The Secretary found that the improvements were not placed on the land by Stram but by Eaton, her attorney in fact, and that she had no direct connection with the land, and that the improvements were not for her personal use and benefit, and therefore concluded that the law had been violated in this respect.

2. Because he held that the execution and delivery by Stram of the power of attorney to convey the land was equivalent to a transfer of the scrip, and that assignments of the scrip were prohibited by the act and held that the power to convey was, for that reason, invalid and that, hence, the location of the scrip was invalid, although he held that the location could be effected by attorney in fact.

It might further be added that the Secretary decided the location upon the land after survey was not valid, although he held there were no intervening rights, because he ruled that such location was but an adjustment to the surveyed land of a previous invalid location.

The Secretary did not decide that patent was necessary to pass the title, but conceded it was not, upon a valid scrip location. He did not decide that the act prohibited the alienation of the land before entry or the making of contracts to sell the same, but held that the result of the transaction was a conveyance of the scrip and hence invalid, as contrary to the prohibition contained in the act, by

which in effect he treated a prohibition against the assignment of the scrip as a restraint upon the alienation of the land.

The contentions of the defendant in error are, briefly stated, as follows:

That the Act of 1854 did not require improvements upon unsurveyed lands to be made "by or under the personal supervision" of the half-breed, nor require him to have "personal contact with the land," and that any land office circulars making these requirements, were unauthorized and an enlargement of and addition to the terms of the law and hence invalid.

That the purpose of the law requiring improvements upon unsurveyed lands was simply to give notice to intending settlers of a prior claim to the land and to prevent such settlers from being misled into settling on the land, and hence that it was immaterial by whom the improvements were made; whether made in person, or under the personal supervision of the half-breed or by agent or attorney.

That no residence upon the land by the half-breed was required; he was not compelled to take it for his own use and benefit, and the original provisions of the act, which constituted a contract as well as a law, cannot be contracted by such a construction.

That as the sole purpose of the law in requiring improvements on unsurveyed lands was to give notice to intending settlers, and as the Secretary found no rights of third parties had intervened when on July 21st, 1885, Eaton applied to effect

the location upon the surveyed land and to adjust the scrip thereto, the government having and retaining the scrip, the location was valid as upon surveyed land and no improvements were required in such locations, either by the act of congress or any circular or requirement of the Department.

That neither the land office circular of 1857 (1 Lester's Land Lawws, p. 627,) nor the circular of 1864 (Copp's Public Land Laws, p. 721,) made any such requirement and that the circular of 1872 made these requirements, not only in violation of the act, but in violation of the construction which the Department had put upon the act for the period of eighteen years and the practice which had been in force during all that time. That the circulars of 1857 and 1864 and the circular of 1878 (2 C. L. L. 1355,) all provided that such scrip might be located either in person or by attorney and no distinction was made between surveyed and unsurveyed lands and the Secretary of the Interior in Allen vs. Merrill, 8 L. D., 219, conceded that such locations might be made by agent or attorney. That a valid power carries with it the right to do all things necessarily incident to carrying out the terms of the power. The power of attorney to Eaton specifically authorized him to do everything necessary to perfect a valid location; hence, the improvements being incidental to the location, the making of the same by the attorney in fact was valid.

The defendants admit that the transaction between Stram and Eaton had for its purpose the acquisition by Eaton of the land, or an interest there-

in, but deny that the same was an assignment of the scrip or that the same violated either the law or the spirit of the law prohibiting an assignment of the scrip. They claim that she had a right to sell and that Eaton had a right to buy the land which she was entitled to receive from the government, or to contract respecting the sale and for a conveyance thereof, either before or after the location of the scrip, and that there is nothing in the language of the act to indicate that congress intended to prohibit or to put restrictions upon the alienation of the land. They contend that the only purpose of the act in prohibiting the assignment of the scrip was to compel the location by, and the issuance of the evidence of title to or in the name of the scripee, so as to prevent the government from being involved in disputes over the ownership of the scrip and over the question of the right to enter land thereunder.

That if an agreement to convey the land was invalid and if the power of attorney authorizing its conveyance was invalid, it was wrong to cancel the scrip location, because, under the law and the uniform practice, and under the decision of the Secretary, himself, the scripee had a right to locate the scrip by power of attorney as was done in this case. The power to locate the scrip being valid and that method of location being valid and in accordance with the practice, no other rights intervening, the scripee having entirely confirmed the location, even tho' the Secretary thought the power to convey was invalid, he should have sustained the loca-

tion. That would have left the title in Stram and there is no claim that she was not entitled to 320 acres of land, or that this particular land was not subject to location under such scrip.

That force and effect should have been given to the deed of confirmation of March 31, 1886, to cure any technical defects or irregularities, if such existed. No injury was done the government. The Secretary does not claim it, but takes the position that the rights of the scripee have been infringed; the scripee did not take such position. She had a perfect right to ratify the acts of Eaton as the acts of herself after she became fully aware of all the facts.

The defendants further contend that the records of the land department, the decision of the local officers and the admissions of the Secretary himself, show that the manner in which Eaton and Stram used this scrip was identical in every particular with the practice that had prevailed from the time the act was passed until the decision in this case rendered in 1889. Such practice was open, notorious and so general and universal that it must be presumed the Department was fully aware of it, and it had been so long acquiesced in that it amounted to a practical construction of the law by the Department upon which the people had a right to rely.

That a former Secretary of the Interior had, by a decision rendered in 1863, decided that Sioux half-breed scrip could be used in the manner in which it was employed in this case, which decision

had never been questioned from the time it had been announced until the case of Hyde vs. Eaton arose; that it had become a rule of property and that it was inequitable and unconscionable to overturn it after such a lapse of time and after the rights of parties had become fixed thereunder.

That the law contained no provision indicative of any intent to restrain the alienation of the land, and that the Secretary erroneously applied the law as tho' it contained such prohibition and as tho' it restrained all contracts with reference to the land or the sale thereof.

That without a scintilla of evidence to support it, he found that the powers of attorney executed by the scripee, had, after many years passing through different hands, lodged in the hands of Frank W. Eaton who filled in the blanks, and, in direct contravention of the evidence, found that improvements, scarcely worthy of the name, had been made by Eaton on the land.

To briefly summarize, we claimed, pleaded, and we think, established from the record, that the Secretary erred in the following particulars:

1. In his construction of the law holding the scrip location invalid because improvements for the purpose of location were not made by the half-breed in person or under her personal supervision or for her personal use, and because she did not have personal contact with the land, and in totally misconstruing the purpose of requiring improvements, the same being only for the purpose of notice.

2. That he erred in giving paramount force, in derogation of the act, to the circular of the Department requiring these conditions to be complied with in enlargement of the requirements of the act.

3. In holding that the execution of a power of attorney to Merritt to sell and convey the land after it should be obtained, operated to invalidate a location made by her duly authorized agent to locate the scrip.

4. In so construing the law as to hold in effect that the provision prohibiting the assignment of the scrip operated as a restraint upon the alienation of the land and against making any contract for the sale of it and against executing an instrument of attorney authorizing its conveyance, prior to the location of the scrip.

5. In holding because she gave a power of attorney to one to locate and to another to convey after the land was obtained, that this operated to work an assignment of the scrip and to invalidate the entry, and in holding that any assignment or attempted assignment of the scrip by the scripee could deprive her of the right to enter the land either in person or by agent.

6. In holding that the scripee had no interest in the location of the scrip upon this or any other land, the same being both impossible in law and contrary to the evidence.

7. In not holding that the location of this

scrip was valid as upon surveyed lands when it was adjusted thereto after survey, without regard to any question of improvements.

8. In giving any effect whatever to the fact that in one or both of the powers of attorney the donee's name was blank when the same were delivered, the same being wholly immaterial, and in refusing to give effect to the confirmatory deed.

9. In finding, contrary to and unsupported by the evidence, that the powers of attorney had, after many years passing through different hands, lodged in the hands of Frank W. Eaton, who filled the blanks, etc.

10. In giving force and effect to immaterial matters with which the government had no concern, viz., the transactions or intended transactions of the scripee respecting the sale and disposition of the land, and in giving effect thereto to invalidate and cancel the valid location and selection of this land in satisfaction of the scrip.

11. In violating and reversing the settled rule of practice on which the parties had a right to rely, and the construction of the law which had for many years obtained, in full accord with which the parties acted in good faith.

12. In erroneously throwing or attempting to throw the land open to new entry, for the reason that the land had become segregated from the public domain and lawfully taken in satisfaction of the

scrip, and the rights of the scripee and those claiming under her had become vested therein. That the action of the Secretary in that respect was arbitray and without authority of law.

13. In not sustaining the scrip location and awarding the land thereunder to Orillie Stram.

The allegations of error upon which the writ was sued out by the plaintiff in error to this court, are such as not to require separate, detailed discussion, but, taken as a whole, the grievance expressed therein is that it was error to sustain the scrip location and the defendants' right to the land through the same, and in not sustaining the action of the Secretary of the Interior and in not holding his action in attempting to cancel such locations and award the land to the plaintiff, or its nominal predecessor, final, valid and conclusive and in affirming and not reversing the judgment of the trial court.

Hence the whole case upon which the judgments of the District Court of the County of St. Louis and of the Supreme Court of Minnesota rest, may as well be discussed in such manner as will bring before the court the controlling questions involved, from which we confidently believe the conclusions and judgments of said courts will be found correct and the allegations of error not sustained.

II.

The Law of 1854, Its Provisions, Intent and Effect.

The Act of 1854, under which the rights of these parties are to be determined, is brief and its purpose plain. It does not bestow a gratuity upon conditions or with restrictions; it does not evidence a gift. The rich agricultural lands on the west side of Lake Pepin, and reaching within close proximity to the capitol of the new territory, were wanted for the white man and the obstruction to the material development of the future commonwealth caused by the ownership and tribal occupancy of that magnificent and fertile tract by the Sioux half-breeds, was thus early in the history of the territory sought to be speedily removed.

This tract of land had, as suggested in our statement of the case, been reserved by the Indians from their cession to the government, and, at their request, by the government bestowed upon the half-breeds and mixed bloods of the Sioux nation, by solemn treaty with the government, nearly a generation before.

Mr. Justice Atwater of the Supreme Court of Minnesota, in the case of Monette vs. Cratt, which was decided in 1862, and reported in the 7 Minn., in speaking of this law said on page 184, of the Gilfillan Edition: "The main object of the act of July

17, 1854, appears to have been to get rid of the Indian or half-breed title to the reservation on the west side of Lake Pepin, and to bring the same into market. It is explicitly provided that the half-breeds should receive a certain quantity of scrip upon executing a complete relinquishment to the United States of their right, title and interest in and to the said reservation, in such form as the Commissioner of the General Land Office should prescribe."

Here in a case arising under this act and where the act, its scope and provisions were the subject of controversy, was a judicial declaration of the nature and purpose of the act by an able jurist and lawyer residing in close proximity to the tract in question, familiar with the whole history of the matter and with the transactions arising thereunder. We shall have occasion as we proceed, to refer to other judicial determinations of the Supreme Court of this state. We beg here to suggest that, while not claiming for the Supreme Court of Minnesota more than is due to it as a court of at least average learning and ability among the courts of our sister states, we do claim that there should be accorded to its decisions with respect to these matters, more than usual deference, sitting as it has at the very threshold of this tract of land, and in the midst of the scenes and transactions connected with and growing out of the dealings therewith under the treaty and enactment referred to, and with the public lands under and by virtue of the scrip issued in pursuance of this act. Its decisions upon the

various questions which have arisen thereunder have been, from the beginning until the determination of this case, consistent, vigorous and in harmony with the judicial determinations elsewhere, including this, the highest tribunal of the land.

By this Act of 1854, the government said to these half-breed people in substance and effect: "You surrender to the government these lands and your title and interest therein, and we will give you as much land elsewhere; we will give you certificates showing that you are entitled to have as much land anywhere in the public domain, not otherwise reserved or appropriated; these certificates shall evidence your right to take and have the amount of land therein specified in compensation for your relinquishment to the government of your pro rata interest, amounting to like acreage in this tract."

The act did not provide for a patent and except for the ordinary usage of issuing patents generally to convey in form the legal title, as referred to in the case in this court of Carter vs. Ruddy, 166 U. S., 493, it might well be deemed, as it was considered by Secretary Vilas, and by the court in Larriviere vs. Madegan, 1 Dillon, 455, and by this court in certain railway grants, that a patent was unnecessary. It is immaterial, however, to the determination of this case, whether it was or not. The act did not provide any condition whatsoever relative to surveyed lands. The lands being otherwise unappropriated, could be selected anywhere from the public domain, the scrip filed and surrendered in payment thereof, and at least the equitable title

was complete in the scripee upon the filing being accepted. As to unsurveyed lands, the only requirement was that some improvements should be made to mark the taking. A diagram of the lands was by the Department, for greater certainty, required to be filed in the local offices and as good a description of the land as could be given by metes and bounds, or by natural objects, thus obtained, and when the land was surveyed, the location was adjusted to the lines of the survey, either upon the application of the scripee, or if he failed to make it, by the land officers themselves. There was no residence required upon the land in either case; occupancy was not exacted; there was no other condition prescribed by which the half-breed should earn the land; it was paid for by the surrender of his interest in the reservation to the government, and the issuance of the scrip operated, to all practical intents and purposes, as a present grant, to take effect when the scrip had been anchored to some particular tract by its location. There was no amount of improvements specified. It was not provided nor required that any house or habitation should be erected thereon. There was no prohibition in the act against the alienation of the land. If the land was surveyed, the scrip could be located and the half-breed could convey it at once without ever having seen or been upon the land or spent a day or an hour of residence thereon. Nor does Secretary Vilas seem to regard that it was any different as to unsurveyed land, save in the matter of descriptions, and no reason appears why that view is not

correct, for it was not required that the half-breed should live upon or build any residence upon or make any home upon the unsurveyed land, only that some improvements should be made, and when the scrip was adjusted to it, the property to which the half-breed's title, at least his equitable title, was perfect, then became identified and received its proper final description among other lands surrounding it.

The purpose of requiring improvements in locating upon unsurveyed lands, has become a matter of some discussion in this case. We submit the improvements were not of paramount importance, but were only an incidental feature to the proceeding. They were not required in order to earn the land; there was no specification as to their character or extent, and there is wanting in the act as well as in the machinery provided after its enactment to carry it into effect, a single line or syllable upon which to base the claim that it was the intention of the government to require the half-breed to build a house or to make a residence, permanent or otherwise, upon the land. If the land was surveyed at the time of the location, no improvements were required.

The counsel for the plaintiff in error has spoken of the force and effect to be given to contemporaneous construction by the executive department of the laws involving matters within their jurisdiction. The Sioux half-breed scrip was issued in February, 1857. For the most part five pieces were is-

sued to each person, two for forty acres each, one for eighty acres and two for one hundred and sixty acres each, and thus the scrip has ever remained. These pieces of scrip were locatable anywhere within the public domain, on lands not otherwise appropriated. Did the government mean to provide that the half-breed should reside upon each piece or parcel? That such improvements as might be made must be made under his personal supervision and direction on each piece and parcel? That he should have personal contact with and reside upon each piece and parcel and take it for his own personal use and benefit? If so, it would indeed be a difficult task for the poor half-breed who might have to live upon one piece in Minnesota, another in California, another in Montana, another in Dakota and another some where else. The issuance of the scrip in this manner shows the construction put upon the act at the time.

If the half-breed had to have personal contact with the land, and if the view of Secretary Vilas is correct that congress had with respect to the half-breed's right under this act intended to express "the same general idea" as it did concerning the settlement upon public lands in the homestead and pre-emption laws (see p. 219, 8 L. D. for his statement in that regard), then it would seem quite necessary that all of these various pieces of scrip should be located upon contiguous tracts, and the recent decision of the local land officers in the case of Augusta Brown, found on pages 601-2 of Vol.

29, Land Decisions, so holding, would be the logical conclusion of such reasoning; but Mr. Secretary Hitchcock over-ruled the local officers in that regard and said, "the Act of July 17, 1854, (10 Stats. 304), which authorized the issuance of scrip in exchange for certain lands belonging to the Sioux Indians and mixed bloods, does not directly or by implication require that location of scrip be made on contiguous tracts."

The Sioux half-breed scrip was issued in February, 1857. On March 21, 1857, a circular of instructions was issued by the Department (1 Lester's Land Laws, 627) by the Hon. Thomas A. Hendricks, then Land Commissioner, the fourth clause of which circular of instructions read as follows:

> "Upon any unsurveyed land not reserved by government, upon which they have respectively made improvements. Where the scrip may be located on unsurveyed lands outside the reservation on which the half-breed has made improvements and which is not resrved by the government, his application for location should be accompanied by a diagram and description, denoting the natural objects and distances so as to fix with certainty the exact locality wanted, *which serves as the best notice in our power to settlers that conflict may be avoided, and enable you, when the public surveys are made, to designate the sub-divisions embracing the location.*"

This circular gives the only valid reason for the requirement of improvements on unsurveyed lands

which can be given, viz., that the same should serve as notice to other parties that the tract had been located and claimed, to the end that conflict might be avoided. Persons being thus put upon their inquiry, could readily ascertain at the land office by the filings the rights of the scripee.

No other reasonable reason can be given. It was not the purpose to make a home for the half-breed or mixed blood, unless he wanted to use the land for that purpose; there was nothing in the act indicating that Congress had any idea of making a homesteader of the half-breed. The purpose of the act was to compensate him in land, without restriction, for land equivalent in acreage, or his interest therein which he relinquished.

Mr. Justice Collins, speaking for the Supreme Court of Minnesota, in the decision in this case (79 Minn., 449,) said:

> "The law under which scrip was issued to the half-breeds or mixed bloods of the Sioux nation, was the Act of Congress of July 17th, 1854, (10 Statute, 304.) The act is not complicated. In some respects it is quite indefinite, but it empowered and authorized the President to cause to be issued to certain mixed bloods, certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the Pepin reservation among them pro rata,"

and on page 450, after some further statement, he said:

> "Thereafter and as empowered by the

1854 Act, the President caused certificates or scrip to be issued to these mixed bloods indiscriminately, and without reference to age, sex or other conditions. The result was that old and young, adults and minors, male and female, those that had but little Indian blood in their veins and those in whom such blood greatly prevailed, were the recipients. And this fact is not to be ignored when discussing the correctness of the Secretary's views, as found in his decision of February 18th, 1889. Under the law there were issued to each one of 640 persons (Mrs. Stram being one of the 640) five pieces of scrip, thus described: 1 A, 40 acres; 1 B, 40 acres; 1 C, 80 acres; 1 D, 160 acres; 1 E, 160 acres, a total of 480 acres each. To each one of 38 persons there was issued one piece for 40 acres, and two for 160 acres,—in all, 360 acres to each. And this is another fact to be kept in mind."

Then, after quoting from the decision of the court in Gilbert vs. Thompson, 14 Minn., 414, he said, on page 451:

"Further considering the law, it is well to look at the construction placed upon it by the officers of the Interior Department soon after scrip was issued to the beneficiaries—a construction contemporaneous with the passage of the law. We find that immediately after its issuance a circular was promulgated by the commissioner of the general land office for the information and guidance of the local officers, a clause of which read that locations might be made,

'Upon any unsurveyed lands, not reserved

by government, upon which they have respectively made improvements. Where the scrip may be located on unsurveyed lands outside of the reservation on which the half-breed has improvements, and which is not reserved by government, his application for location should be accompanied by a diagram and description, denoting natural objects and distances, so as to fix with certainty the exact locality wanted, serve as the best notice in our power to settlers, that conflict may be avoided, and enable you, when the public surveys are made, to designate the legal sub-divisions embracing the location.' 1 Lester's L. L., 628.

"We have discovered that it was required, not that the improvements upon unsurveyed lands must be of a reliable or permanent character, or that they should be made by the scripee or under his personal direction, but that the application should be accompanied by a diagram and description, that the exact locality might be designated, and thus, in connection with the improvements upon the ground, conflicts might be avoided between claimants, and the locations more easily and certainly adjusted when surveys were actually made. The making of improvements by or under the scripee's immediate direction, was not made of prime importance by the commissioner when preparing these instructions. The practice and custom of making scrip entries was definitely understood and well settled in the seventeen years which followed, prior to the issuance of another circular."

and further on, at the bottom of page 451, he says:

"We are of the opinion that the purpose of this feature of the law, requiring improvements to be made where the scrip was located

on unsurveyed lands, must have been that visible notice, by work done on the ground, might thereby be given to other persons of the scripee's prior right, and thus prevent collision and conflict. The language as to improvements was general and vague. None were required where surveyed lands were located and it is very evident that this requirement was for a minor purpose. Obviously, it was not the design of the law to compel actual, settlement or residence upon the land; for, had it been, the language would have been plain and unambiguous. This purpose was accomplished wherever the improvements were of such a character as to be notice, and their value or extent was of little consequence. That in this case they were ample as notice ought not to be questioned. The entire purpose of the act itself seems to have been to promote and secure an exchange of the interest of the mixed bloods in the reservation, which was becoming valuable for actual settlers, for certificates or scrip which would be available for the acquirement of title in fee to specific parcels of land there or elsewhere on the public domain."

On page 453, he says:

"Now, when we examine some of the provisions of the law, we are led to ask, could it have been the intention that each person to whom certificates or scrip was issued should see the land in person, upon which each piece was to be located, or should, in person see the improvements or claim the same for personal use, or be directly (that is personally) connected with either or both? Under this law the President was authorized to do what was actualy done, issue to each person entitled several pieces of scrip, of different sizes and acre-

age. Was it expected that each of these persons should be personally connected with the several and separate improvements required to be made, if all the pieces were located on unsurveyed land, and would have to claim the same for personal use? Surely not. This law contemplated and there were actually issued several pieces of scrip each to a large number of minors. Babes in arms were held to be entitled, and to them scrip was issued, and in many cases located before the minors reached their majority, as might reasonably be expected. With these facts before us, can it be held that congress thought or intended that these minors would be required, by a construction of the law, personally to supervise the selection of from three to five tracts of land on which to locate their pieces of scrip, or that they would have to be directly connected with each of these locations, or in case unsurveyed lands were desired, they would have to claim the necessary improvements as their own? In other words, do not these facts indicate, to a moral certainty, that it never occurred to the members of congress that the construction placed on this law by the Secretary would be given to it at any time,—much less after thirty years of a wholly different construction? And a construction, also which received judicial recognition and approval. See Gilbert vs. Thompson, *supra;* Hope vs. Stone, 10 Minn., 114 (141); Marks vs. Dickson, 20 How., 501. ******** The act itself never required that the improvements should be of a certain kind or value, or that the scripee should be directly connected with the land. It quite conclusively appears to the contrary, when we consider the facts before referred to, unless we take the position that the legislative branch of the gen-

eral government intended to confer upon the mixed bloods, in exchange for their interest in the reservation, scrip which would be of no value unless the recipients made personal selections, were directly connected with the locations and improvements and made claim to both for their own use and benefit."

Mr. Justice Collins has sat for many years upon the supreme bench of Minnesota, and for many years prior thereto, upon the district bench of one of the central districts of the state, and for years before that was a member of the legislative bodies of the state. He has been familiar with the course of business tranactions, with judicial determinations and with departmental construction upon matters involving this law from the very beginning.

Here then is contemporaneous construction of the Department; contemporaneous judicial construction by the Supreme Court of Minnesota contained in the decision of Judge Atwater referred to; by subsequent cases, as in the case of Hope vs. Stone, 10 Minn., 114, and the case of Gilbert vs. Thompson, 14 Minn., decided by Chief Justice Gilfillan, who ranked favorably with any state supreme court judge, the whole course of which is admirably summed up by Mr. Justice Collins in the decision in this case.

These decisions show what the act itself shows, that there was no disposition on the part of Congress to impress the provisions of this act with the requirements of the homestead or pre-emption laws,

or that its application and construction should be governed by the controlling principles of these laws. In the very act itself the word "exchange" is used. It operated to effect an "exchange" of the lands. That which, according to Secretary Vilas' own language, governed and controlled him in reaching his decision is thus shown to be an entirely erroneous view. The construction thus placed upon the law, and what was done by the government to put it into effect, conclusively shows that it was not intended to be required by the act that the half-breed should necessarily have personal contact with the land, personal supervision and direction of the improvements to be made, but that they might be made by an agent or attorney, or that the matter of improvements was of prime importance, or had any other purpose than the mere serving of notice to intending settlers to avoid conflict. To such sources as these, and to such old and experienced lawyers and jurists as these, we prefer to look for a proper construction of the law, rather than to the learned counsel for the plaintiff in error who had not yet been born when this construction of the law began, and who had not turned his face westward until after this settled construction of this act had been undisturbed and unquestioned for a quarter of a century. Therefore, that, which by the terms of the law was secured to the half-breed without restriction, by the erroneous construction thereof by the Secretary was denied him; by which reversal of previous construction, rights which had become vested, titles

which had become settled, were to be over-turned and brought into question. The title of farms, whole towns and villages, and valuable mines held with confident security under the terms of this act and the construction which had been placed upon it, as well as the title to the land in question which is conceded to be of considerable value, was assailed by this decision resting upon departmental requirements which were unauthorized by the act, and which, during the period of time within which most of this scrip was located, would have been of almost absolutely impossible compliance.

On the subject of the improvements and the personal supervision of the making thereof, the right to make the same by attorney or agent, on the subject of the purpose of the act and the requisites to a valid location, and on the subject of the matter of personal contact with the land and of taking the same for the personal use of the scripee, therefore, the decision of the Secretary is entirely erroneous subversive of the rights of the scrip holders, contrary to the act and its evident intent, and to the long continued construction thereof.

The law did not require that the half-breed should take the land for his own use and benefit but gave him the right to have the land to do with as he pleased, without restriction, and under all judicial authority that can be cited on the subject, he could sell it as soon as he pleased after location and could contract to sell it even before he got it.

What one may do in his own right, unless some good reason exists to the contrary, he may also do

by another acting as his agent for the purpose. Such has been the common law from time immemorial. It seems to be a ridiculous and senseless proposition to hold that the half-breed must construct the improvements with his own hands or must sit by and watch another do it under his direction, when it is held he could employ an agent to effect the location. A statute in derogation of the common law is to be strictly construed.

Shaw vs. Ry. Co., 101 U. S., 557.

No more will a construction in derogation of the common law be upheld unless the intent clearly appears.

It is not to be presumed that the legislature intends by the language of its enactments to impress any new, strained or unusual meaning upon the terms used. This is a familiar rule of statutory construction.

The decision of Mr. Sparks, the Commissioner of the General Land Office as before stated, turned this incidental and wholly unimportant provision, designed, not to protect the government, but to prevent conflict, into the vital and all important question in the procedure, by which the land might be obtained and held adversely to the scrip claimant, because the half-breed had not been shown to have had personal and direct contact with the land and the improvements, and the Secretary said he concurred in the view expressed by the Commissioner. (See Sec'y Vilas' decision, Fol. 213 Transcript.)

In order to give this interpretation to the law, there had to be read into the statute things not there and for which no good reason could be given for their not being there if congress had so desired and intended. At this day it needs no argument to enforce the contention to this court that conditions and provisions wholly unauthorized by a law cannot be read into it by the Secretary of the Interior in enlargement thereof or in restriction of the grants thereby made.

This court, in the exercise of its judicial power, will determine, without being hampered by this new construction of the Secretary whether the statute bears any such interpretation as given it.

Webster vs. Luther, 163 U. S., 331.

In that case a construction with much reason had for years been placed by the land department upon the law providing for soldiers' additional homesteads, construing the same as a part of the homestead laws and hence subject to the restrictions and requirements contained in such laws, but the court over-ruled it because in the view of the court the statute did not warrant it or justify the conditions and restrictions imposed by the Department by virtue of its construction of the law. (See last paragraph of the decision.)

Neither can it be claimed that any different construction should be put upon the law because the parties affected were half-breeds or mixed bloods, by virtue of any special solicitude for them

or paternalism to be exercised in their behalf by the government. If such was the intention of congress, why should it not have imposed like requirements as to surveyed lands as to which it is not even claim- that it was necessary that any improvements whatever be made or that the half-breed should ever see the land. As we shall see in our discussion of alienation, the court will not consider that because a person is a half-breed any different presumption should be raised in his behalf or, any different rule of statutory construction invoked.

Upon the only reason assigned by the Commissioner and which was approved by the Secretary in the decision by which these parties were deprived of this land, the decision was clearly wrong and rests upon a wholly erroneous construction of the Act of 1854, and it is within the power and duty of the courts to correct it.

The land department is full of cases where Sioux half-breed scrip locations have gone to patent without any notice whatever having been taken of the matter of improvements, and that too where the scrip was first located upon unsurveyed lands; and where there have not been adverse claims intervening, no importance whatever seems to have attached to the matter of improvements. As a result of an examination made in the land department on this question, we have been furnished with references to a multitude of cases which verifiy the above statement, but it does not seem to us profitable to here enumerate them.

While considering the construction placed upon the law and the requirements imposed by the Secretary with reference to improvements, to the personal supervision thereof and to personal contact with the land by the half-breed, in passing we might call attention to the finding of Secretary Vilas to the effect that "slight improvements, scarcely worthy of the name, were made upon the premises." We have claimed in respect to this, that such a finding was wholly unwarranted by the record, and that he seems to have gone out of his way to inject this finding into the case, and we have the right to presume that because he so found, is one of the reasons, or perhaps, more correctly speaking, one of the apologies for his decision in this case.

In the first place we invite the attention of the court to the record. The evidence shows that two log houses were built upon the claims, 14 by 16 feet and a story and a half high. They were provided with a door and a window of the same character as was usual in case of pre-emption and homestead claims in this district. Some land was cleared, lines were run with care and stakes set. Does anyone claim anywhere in this record that they were not apprised of these scrip locations by reason of these improvements? Not at all. It is frankly admitted upon the record that all parties had knowledge of the rights and claims of the scrip claimants. The fact that the parties who went into a conspiracy to try to deprive these claimants of the lands, undertook to discredit the extent of the improve-

ments and undertook to hire a surveyor to try to show that the lines were not correctly laid, all goes to show that these improvements served most effectually the only purpose for which the law required them.

Again, what right had the Secretary to criticize the extent of the improvements? The law fixed no minimum limit upon its requirements. It did not require the building of a house at all; it did not require residence; it did not require occupancy. Clearly the Secretary of the Interior was too exacting in this decision, more so than the law required. These log houses, or shanties if you may so choose to call them, might not be proper decorations for metropolitan streets, but in that distant section of the country, it was no small undertaking to build them, and they were doubtless quite as good as if the half-breed herself had chopped down the logs and built the habitation, which seems to have been the Secretary's idea of the requirement.

It is conceded that the beneficiaries of this scrip could act by agent in locating it. Indeed they had so acted for more than a quarter of a century. If so, can any good reason be tendered why they could not act by agent in making the improvements necessary to mark the fact and extent of such location? If so, then again the Secretary of the Interior erred in holding that they were not made by or for the benefit of the scripee, if they were made in support of ther entry and location, and by her authority, or at

the instance of the agent who was authorized "to do all acts necessary to effect and secure a permanent location of the scrip."

We invite the attention of the court to the exhaustive and convincing memorandum filed by the learned trial judge. (Pages 275 to 301, Transcript.) And at this particular juncture, we call special attention to his discussion of the requirements of improvements on unsurveyed lands and his conclusion that an agent could make the improvements necessary to effect location as well as the reservee, and that it being but an incident to the consummation of the location, the power to locate embraced the power to make the improvements. That if it had been the purpose of congress to make a settler out of the half-breed, clearly it would have applied with equal force to locations on surveyed lands. (See Fol. 842-848, Transcript.) Also the clear and vigorous expression of the Supreme Court of Minnesota on these same questions in affirming the decision of the trial court in this case. (Pages 330 et seq. Transcript, 79 Minn., 442.)

We are unable to appreciate the force of the argument for the appellant made in the Supreme Court of our state against this reasoning of the trial court, wherein its counsel said (page 101 of his brief in that court:) "It requires but little consideration to convince one that this is an entirely erroneous view." He then says: "The whole purpose of the act of congress as shown by the legislative history of the act, the known habits of the Indian, the language itself and the general policy of the

government with reference to its public lands, conclusively shows that the whole object was to protect *the half-breed who had gone beyond the limits of the reservation and settled upon unsurveyed lands.*"

The counsel then cited the decision in Felix vs. Carroll, (which will be found in full in an appendix to Mr. Harris' brief,) where Judge Otto held that it was only in case of unsurveyed lands that improvements were required as an antecedent to right of location, but what benefit that decision is to plaintiff's contention is not discernable. Where in the act is there any limitation that only such unsurveyed lands could be taken as the Indian had at the time of its passage settled upon? It has always been held that under this scrip, at any time no matter how long since, unsurveyed lands could be taken. The language of the act itself and every construction ever put upon it by the Department or by the courts or even by Mr. Secretary Vilas, import no other meaning than that at any time unsurveyed lands could be taken under the scrip; no requirement of residence or settlement can be read into it, and it was not limited to occupants of unsurveyed lands at the time of the passage of the act.

What explanation can be made then of the fact that if the purpose of congress was to make a settler of the half-breed and put him upon the basis of a pre-emptor, that it required improvements upon unsurveyed lands only and as to surveyed lands required no improvements whatever, or even that the half-breed should ever see the land?

We have listened in vain for any answer to this question. If the government intended to continue a guardianship over the half-breed in the issuance of this scrip, the purpose to do so is not disclosed in this act.

Counsel has heretofore argued that the right of pre-emption settlement was extended to Minnesota by the Act of August 4th, 1854, which authorized settlement to be made upon surveyed or unsurveyed lands, but that the right of pre-emption settlement upon unsurveyed lands generally was not authorized until the Actof June 2nd, 1862, 12 Statutes at Large, 413; that the Homestead Act of 1862, did not authorize settlement upon unsurveyed lands and that it was not until the Act of May 14th, 1880, that homestead settlement upon unsurveyed land was recognized, and hence that settlement upon unsurveyed lands could not be made, and that, therefore, the requirement of improvements in the Act of July 17th, 1854, could not have been to prevent conflict, and that the reasoning of the trial court is necessarily erroneous.

Let us see if counsel's contention is well founded. In the first place, let it be noted that the half-breed under this act was not limited to Minnesota; he could go anywhere and locate upon government land, surveyed or unsurveyed, where it was not taken or reserved.

It had been the policy of the government for many years prior to the Act of July 17th, 1854, to

recognize the rights of settlers upon unsurveyed lands.

July 14th, 1832, 4 U. S. Statutes, 603, congress passed an act supplemental to the old pre-emption Act of 1830, providing that parties entitled to a pre-emption, according to the provisions of the Act of May 29th, 1830, "who have not been or shall not be" enabled to make proof and enter the land in consequence of public surveys not having been made, should be permitted to enter the said lands on the same conditions in every respect as prescribed in that act, within one year after the surveys were made.

A further similar act intended to enlarge the provision, was passed March 2nd, 1833, 4 U. S. Statutes, 663. By implication the right was recognized in an act passed June 22, 1838, granting pre-emption rights to settlers on public lands, 5 Statutes at Large, 251; and in an act supplemental to this act, passed June 1st, 1840, (5 Stats. at Large, 382), the rights of such settlers on unsurveyed lands were protected where the land, when surveyed, turned out to be set apart for the support of schools, and authorized the taking of other land in lieu thereof. The pre-emption act of September 4, 1841 (4 U. S. Stats., page 453), was of general application to all public lands to which the Indian title should have been, at the time of settlement, extinguished. It applied to Minnesota as well as elsewhere. It did not specifically provide for settlement upon unsurveyed lands, but by an act of

March 3rd, 1843, (5 U. S. Stats., page 620, Sec. 3), settlers upon unsurveyed lands in certain cases where the location proved after surveys were made to be on lands reserved for schools, were given credit for their settlement and allowed to take other lands at a minimum price.

There were numerous laws applicable to certain states and territories in the United States which permitted settlement to be made on unsurveyed lands, and Section 7 of the Act of May 30, 1862, (12 Stats. at Large, 410) provided "that in regard to settlements which by existing laws are authorized in certain states and territories upon unsurveyed lands," a declaratory statement should be filed within three months from the date of the receipt at the district land office, with the approved plat of the township embracing such pre-emption settlement.

The Act of February 26th, 1859, found in the 11 Stats. at Large, 385, provided that where settlement with a view to pre-emption had been made before the survey of the lands in the field which should be found to have been made on Sections 16 and 36, said sections should be subject to pre-emption claim of the settler, and that if such sections had been reserved or pledged for the use of schools or colleges in the state or territory in which the lands lie, other lands of like quantity were thereby appropriated in lieu of such as may be patented by pre-emptors.

It is true that an act was passed August 4th, 1854, three weeks after the passage of the Sioux

half-breed act, specifically making the pre-emption law of 1841 applicable to all unsurveyed lands in the State of Minnesota. It had theretofore been applicable to all surveyed lands, and even a cursory examination of the acts of congress shows that it has been the continued policy, from a time long antedating the passage of the Sioux half-breed act, to protect settlers upon unsurveyed lands. Without doubt this act was pending in congress before the act of July 17 was passed. This must, then, have been in the mind of congress, and instead of an examination of these acts showing that the reasoning of the court is necesarily wrong, such examination argues conclusively for the correctness of the view of the trial court as expressed in the memorandum, and such view, we have seen, is in accord with the view of the Hon. Thomas A. Hendricks when, as Commissioner of the General Land Office, he issued the circular of instructions of March 21st, 1857, herein before referred to and quoted from.

The counsel for the plaintiff in error in his brief in the Supreme Court of Minnesota, wrote a chapter of three pages (commencing on page 18), which he called the "legislative history" of this act. It consisted of little more than a quotation from a report made March 4, 1854, by Mr. Geo. W. Manypenny, Commissioner of Indian Affairs, and a few excerpts from some remarks made in the house of representatives by Mr. Wright who was a member of the committee on Indian affairs. He made the following quotation from Mr. Manypenny:

"The Indian titles to the whole of the country surrounding said reservation are now extinguished, and the bands to which said surrounding country belonged have removed westward, and many of the less cultivated of said half-breeds are desirous of disposing of their interest in said reserve and following their Indian relatives. Some have already gone. Justice, humanity and sound policy alike second their desire; for all experience demonstrates the utter incompatibilty of the uncivilized Indian with civilized life. Many of them, however, are represented as being educated, and having judgment and experience sufficient to take care of their own interest. A number of them are said to be men of much intelligence, possessing property, and having become citizens of Minnesota and the adjoining states. Some of them have served in the legislature and filled offices of honor and trust in the Territory, while others are engaged in agriculture, mercantile and other profitable pursuits. With them, at least the object of the fostering policy of the government has been attained, in fitting them for civilized life; for in point of intelligence and civilization many of them would compare favorably with their white brethren."

We do not know whether counsel will care to reproduce this matter again, but it is quite difficult to see how it in any manner assists the construction placed by him and the Secretary upon this law. As seen above, he quoted Mr. Manypenny as saying that the less cultivated of the half-breeds were desirous of disposing of their interests in the reservation and following their Indian relatives. In other words, preferred tribal life. And further quoted him as

saying that all experience demonstrates the utter incompatibility of the uncivilzed Indian with civilized life.

Evidently, then, it was scarcely expected to make farmers and pre-emptors out of these. Mr. Manypenny further says that some were men of much intelligence, possessing property, having become citizens of Minnesota and other states, some had served in the legislature and held other offices of trust and some were engaged in business, and that the fostering policy as to these had been attained and that in point of intelligence and civilization they would compare favorably with their white brethren. Certainly then the government had no need to preserve a guardianship over these and put any restraint upon them in the management and disposition of the land which it agreed to give them. If a portion of the half-breeds desired to join their tribal relatives and others had become men of business and affairs, in these conditions alone may be found the reasons why congress did not see fit to place any restriction upon the alienation of the land, or require residence thereon or any personal contact therewith, either as to those who had bought lands for themselves elsewhere or were engaged in business, or those who did not want to sever tribal relations; and even in these very things in part may be found the reasons why congress determined that scrip without restrictions, save that it should not be assignable, was best applicable to all classes of half-breeds and best calculated to give them the greatest financial return for their lands.

So far as the excerpts from Mr. Wright's remarks are concerned, the same are not applicable to the act as passed, and his remarks would hardly be controlling in the face of the provisions of the act itself. The court will look to the act in order to determine its intent. The intent of the law is the intent expressed in the statute. If the words of the act are free from ambiguity and express plainly and definitely the sense of the framers, there is no need to resort to other means of interpretation. The statute itself furnishes the best means of its own exposition. If the sense in which words were intended to be used can be clearly ascertained from the provisions, the intention thus indicated will prevail without resorting to other means of aiding in the construction.

Sutherland on Statutory Construction, Sections 236, 237, 238 and 239: "If the legislature has expressed its intention in the law itself, with certainty, it is not admissable to depart from that intention on any extraneous consideration of the theory of construction."

Section 236, Sutherland on Stat. Const.
Denn vs. Reid, 10 Peters, 524.
McCluskey vs. Cromwell, 11 N. Y., 601.
Bank vs. Colgate, 120 N. Y., 381 at 393.
People ex rel Bocher vs. Wemple, 115 N. Y., 308.
Sturgess vs. Crowninshield, 4 Wheat., 202.
United States vs. Hartwell, 6 Wall., 385.

Counsel referred to Blake vs. Bank, 90 U. S., 307, and the Chinese Exclusion case, 130 U. S., 581, to the point that courts resort to public documents and journals of congress for the purpose of ascertaining the legislative history of an act for aid in its construction.

Blake vs. Nat'l City Bank, 90 U. S., 307, was a case where there was an ambiguity and contradiction on the face of the act. The proceedings in congress were examined to ascertain the intent of the act.

In the Chinese exclusion case there was no ambiguity in the law; the court merely took up the history of the various treaties between China and the United States and the legislation to carry them into effect for the purpose of presenting with greater clearness the matter of the objections to the constitutionality of the law.

Congress has passed many laws relative to rights in unsurveyed public lands. It has passed many laws relative to Indians. The question here is not what congress might have put into law, nor what it has put into other laws, but what it put into this law.

It made no provision for residence or settlement; it made no requirement as to the extent or character of the improvements. It simply required some improvements when unsurveyed land was taken. There is then no reason to read anything else into the act, nor to hunt in a waste basket for means of interpretation. Congress has not found it difficult to make plain and distinct provisions for settle-

ment and residence, or to specify restrictions upon the acquisition of public lands for the personal use and benefit of the applicant, whether Indian or white, when it desired so to do, or to place restrictions upon alienation, or to prohibit the seizure of the lands to satisfy debts previously contracted.

It is not difficult to see why it did none of these in this act. But we need not hunt for reasons. It did not incorporate such provisions in it. The attempt to resort to other land laws, the appeal to the alleged policy of the government toward the Indian are but evidences of the weakness of the plaintiff's contention that any such requirements as seem to have had such controlling influence with Mr. Secretary Vilas can be found authorized by the act itself.

The act, then, was at the same time a law and a contract. In and by its very terms it provided for an "exchange" of lands; it gave land for land; it authorized the issuance and delivery of scrip which when laid upon a particular tract operated to vest the ownership of that tract in the scripee, whether a legal title or only an equitable one, it matters not; either is sufficient for our purpose. The act was also wanting, we assert, in any provision restricting the alienation of the land, but we will make this matter of restriction upon the alienation of the land the subject of the next brief succeeding chapter, leaving any further or more full discussion of that branch of the case to Mr. Harris, counsel for other defendants in error.

III.

There is no Restriction in the Act upon Alienation of the Land; There was Nothing to Prevent the Half-breed From Conveying the Land as Soon as Entered, nor to Contract its Conveyance Even Before Entry; or Before its Location to Authorize Another to Convey it as soon as Obtained.

The only restriction in the act was "No transfer or conveyance of any of said certificates or scrip shall be valid." We believe it is claimed by the plaintiff in error's counsel that this is more than a prohibition against the assignment of the scrip or certificate and was intended to operate as a prohibition against the alienation of the land, prior to location, and, as we understood him to say upon the trial, until after the patent had issued. We submit the provision bears no such construction. Congress has never found it difficult to find appropriate language by which to restrict the alienation of land, when it wished to enact such a law. This act provided no restriction upon the alienation of the land. It is admitted by the Department even, that the half-breed could convey the land as soon as the scrip was located, without waiting for patent to issue.

See Secretary Vilas' language in Allen vs. Merrill, 8 L. D., 217, as follows: "When the location is

made, if validly made, the title vests at once in the person to whom the scrip was issued."

The government got land from the half-breed and agreed by the scrip to give him other land instead. It got the land without restriction; it gave him land without restriction. It did not require him to live upon it; it did not give it to him to make a home upon, unless he saw fit to devote it to that purpose. It did not indicate any purpose to follow him with any tutelage or guardianship over him in his method of dealing with the same. If the government intended to exercise any guardianship, it would be more in line with such policy, that it should try to make the right given with such certificates as valuable as possible, and not impose restrictions upon the alienation of the land to decrease its value.

The Act of 1854, was a contract as well as a law. It agreed to give land for land, and no purpose is evinced to vest any less estate in the beneficiary because he was a half-breed. No purpose was evinced to vest in him any modified estate or to restrict him in the full enjoyment, use or power of alienation of his land.

So far as the grant without restrictions was concerned, the consideration for which had been received by the government at the time of issuing the certificates or scrip, it was as absolute in all particulars as the grant or reservation to Chief Pet-chi-co involved in the case of Doe vs. Wilson, 23 How., 457, or the Indian chiefs in Jones vs. Meehan, 175 U. S.,

1, or to Francis Besion in Crewes vs. Burcham, 66 U. S., 352. The delivery of the certificates made the individual right without restrictions complete. The taking and selection of the particular tract desired which could be done concededly in person or by agent, was all that remained. No restrictions existed unless they are to be implied.

In Webster vs. Luther, 163 U. S., 331, L. Ed. Book 41, page 179, the Supreme Court of the United States, in relation to additional homesteads said:

> "Any restriction upon its alienation must decrease its value. We are unable to find anything in the acts of congress or in the dictates of an enlightened policy that requires the imposition of any such restraint. On the other hand, the general rule of law which discourages all restraints upon alienation, the marked contrasts between the purposes and the provisions of the grant of the right of the original homestead and the purposes and provisions of the grant of the right to the additional land ******leaves us without doubt that the assignment before entry of the right to this additional land granted by the U. S. Rev. Stat., No. 2306, contravenes no public policy of the nation, violates no statute and is valid as against the assignor, his heirs and assigns."

In Poirier vs. Barnes, 57 Fed., 956, the Circuit Court of Appeals said:

> "The beneficiary was left free to select this additional land from any portion of the vast public domain described in the act, and free to apply it to any beneficial use that he chose. It

was an unfettered gift in the nature of compensation for past services******The presumption is that congress intended to make this right as valuable as possible."

Restrictions upon alienation are not favored by the law and are not implied. It requires a clear provision restraining or prohibiting alienation of the land in order to give such an effect to the law.

Camp vs. Smth, 2 Minn., 142.
Dole vs. Wilson, 20 Minn., 356.
Townsend vs. Fenton, 30 Minn., 530.
Myers vs. Croft, 13 Wall., 291.
Maxwell vs. Moore, 22 How., 185.
Threadgill vs. Pintard, 12 How., 15.
Doe vs. Wilson, 23 How., 458.
Lamb vs. Davenport, 18 Wall., 307.
Webster vs. Luther, 163 U. S., 331.

The fact that the government saw fit to make the scrip, as such, non-assignable, does not operate to prevent the beneficiary before location from making an agreement or giving power to convey the land when the scrip shall have been located and the land entered.

This is illustrated by the foregoing decisions, to which may be added the following:

Gilbert vs. Thompson, 14 Minn., 544.
Knight vs. Leary, 54 Wis., 459.

Mr. Justice Collins in the decision in this case

states the matter clearly and concisely when he says: (79 Minn., 452, Folio 359 Transcript.)

> "It was proposed to compensate the mixed bloods, who surrendered their rights or claims under the treaty, in a manner which would be of some value, and it has been held that the fact that the government saw fit to make the scrip, as such, non-assignable, does not operate to prevent the beneficiary from making an agreement before location, or giving power to convey the land when the scrip shall have been located and the land entered. We need not cite decisions in support of this proposition for they are abundant—federal and state. Nor need we stop to consider why congress saw fit to declare that the scrip should not be assignable, and yet failed to deprive the scripee of the power of alienation immediately after the location, and in pursuance of a bargain previously made. It is enough to know that the prohibition related solely to assignments of the scrip itself."

Secretary Vilas held that the government intended to express "the same general idea" as in homestead and pre-emption laws. He held the scripee could locate by agent or attorney. Necessarily, therefore, in case of surveyed land, she need not do a single thing except what the agent could do, but in this case he held that by agent or attorney she could not make the improvements necessary to effect a location of unsurveyed lands; that they must be made by her in person or under her personal supervision and for her personal benefit; that to act through agents and attorneys to procure the

land and to sell it when procured was void *because it was an attempt to sell the scrip* and hence within the prohibition. If the beneficiary was sick, infirm or a minor of tender age, then by this construction, the benefits of the act are nullified.

The above holding is all the more surprising in the light of his admission in Allen vs. Merrill, 8 L. D., 219, that the improvements could be made by agent if intended for her enjoyment.

Without quoting at length from the various authorities above cited, we urge with the greatest confidence that the only prohibtion contained in this statute, relative to alienation, was the simple one that the scrip should not be assigned. It could not be located except in the name of the scripee. What then was the purpose of the government in making this provision? Clearly it was not for the purpose of exercising a guardianship over the Indian or half-breed, for none of the provisions of the act indicate any inten to exercise such guardianship. None of the provisions of the act indicate any intent to deprive the Indian or half-breed of the full benefits and advantages of the right of alienation of his land after location. None of the provisions of the act indicate that the government held toward the half-breed any such view as that he was unable to deal intelligently with his land, or to obtain a proper price for it, or to withhold any power to sell or dispose of it as soon as it had been located. He was not restricted to obtain it for his personal use and benefit, and

counsel has quoted from the Commissioner of Indian affairs to show that some of the beneficiaries wished to continue tribal relations, while others had come to be men of affairs. Hence it seems to us that no consistent argument can be made on the ground that it was on account of any special solicitude on behalf of the half-breed that the scrip was made non-assignable, nor that it was purposed to quarter him upon the lands which might be taken under this scrip.

When purposes of settlement were sought to be enforced, the government has seen fit to impose restrictions upon the white man with reference to alienation; when such purposes were not sought, it has been held that no reason exists for interpolating into the policy of the law such restrictions. Here no residence was required, no improvements even were required of any kind whatsoever when the land was surveyed, yet it is argued that a different rule of construction should be adopted because the beneficiaries were half-breeds. We are yet to be advised of any substantial authority cited on that proposition.

Mr. Justice Brewer, in the case of Felix vs. Patrick, reported in the 36 Fed. 457, has expressed himself quite clearly upon this subject. On page 461 he says:

> "But it is erroneously contended that a different rule should be applied in this case because the plaintiff and his ancestors were Indians; that the law is very tender in respect to the rights of such persons, who are not familiar

with our laws and methods of transacting governmental or private business, and were ignorant of the disposition which had been made of the scrip. And it is also urged that as Indians they were the wards of the government and could not have asserted their rights to the property, even if they had known what their rights were. It is not shown that they were not persons of education and intelligence, or that they were not in fact familiar with the land laws and the methods of governmental business, or that they were not in fact as competent to look after their rights as any person. We all know that many of these Indians, especially the half-breeds, are well educated, intelligent and as fully competent to look after their business as any persons; and the fact that they were Indians and maintaining tribal relations and were in a certain sense the wards of the government, did not debar them from a hearing in the courts of Nebraska."

We do not know that it devolves upon us to assign a reason for congress declaring that the scrip as such should not be assignable and should not pass by transfer with the freedom of personal property, but we do not think it difficult to assign such a reason. We believe that the reason assigned by our associate Mr. L. C. Harris, is the most satisfactory one which can be given, viz: That it was done in order to protect the government and to avoid entailing upon the government the risk of forgeries in transfers or of conflict over the transfers; that the government intended to keep its contract to give the scripees the land and that it would issue its evi-

dences of title to the scripee and leave the courts to determine any questions which might arise over the ownership of the lands by any transfers which might be made. This simplified the work of the government in the distribution of the land and left to the land department that which was more properly within its province and relegated to the courts that which belonged to them. Counsel argues this could not be the reason because in some other scrips more numerous than this, the government had not made this restriction. Perhaps its experience conduced to placing the restriction in this act. There were about 3500 pieces of the scrip. It was so provided that the half-breed could freely alienate and contract for the alienation of the land, and it was assuredly seen that he would do so. The land being given in exchange for land the provision for location by means of scrip was simple and speedy. The government was interested only that when it gave the land the scrip should be properly satisfied. It agreed to give the land in satisfaction of the scrip; it agreed to give it to the scripee and when it had done this it was not interested in the contentions of private parties and did not propose to interest itself in such contentions or meddle with the subject of transfers.

The case of Walter Bourke in 12 L. D., 108, indicates that Secretary Noble at that time must have held the same view. Had the government had any other purpose in view or had it had in view the purpose of exercising a guardianship over the beneficiary of the scrip, it provided indeed most meager

measures to accomplish it. There is a total absence in the act of any indication to treat the beneficiaries under this scrip with any less or greater consideration, or to deal with them as being of any less capacity than it has in various enactments in the case of white persons.

An examination of the various Indian treaties and the laws pertaining to the public lands is instructive as showing that to both Indians and whites, congress has at times imposed restrictions, at others, not; and the courts have ever held and must continue to hold that where no restrictions are imposed by the law, it will not be implied that any were intended, and the departmental officers cannot add provisions by their construction, either in enlargement or restriction of the law itself.

Mr. Harris, counsel for the other defendants in error, will doubtless carry the discussion under this head to a much greater extent, and has heretofore made a very interesting and instructive collation of the provisions contained in various Indian treaties, illustrative of the intent of the government in different cases and under different circumstances, and of various cases showing the construction placed thereon by the courts, and on that account, as well as because in our view there can be no serious question about the construction of the law in this regard, we do not desire further to prolong this chapter.

IV.

The Record shows the Scrip was located in good Faith and in Accordance with the Accepted Practice, for the Purpose of Obtaining the Land in the Name of the Scripee in Satisfaction of the Scrip and for Her and her Assigns. The Land in Question was Segregated from the Public Domain and validly Appropriated by the Location of the Scrip. If the Scrip was Properly Located, no other Act done or in Contemplation Concerning the Land or the Sale or Conveyance thereof could in any Manner Affect the Validity of the Location.

The record does not show an assignment of the scrip or any attempt to assign the same. It does not show any act intended to defraud either the government or the scripee, or which worked any fraud upon either the government or the scripee. Absence of fraud was freely conceded upon the trial by the plaintiff. It does not show any attempt to get the land in any other way except in satisfaction of the scrip and in the name of the scripee, and with what the scripee got out of the land or by means of the location of the land in her name, and her conveyance thereof, the government was and is in no manner concerned. We admit that the record shows

that Frank W. Eaton desired to obtain an interest in the land, but aver that the record shows that he desired to obtain such interest through Orillie Stram, by the legitimate surrender by her to the government therefor of her scrip, and by conveyance from her. To that end he dealt with her through the mutual agency of one Smith. The result of the negotiations was that he was duly empowered to locate the scrip and to do all things necessary "to perfect and secure a permanent and bona fide location" thereof.

Suppose Orillie Stram had been told that if she entered this land with her scrip she could sell it for $5,000; suppose she had actually agreed with Eaton, or anybody else, to sell it for that after it was entered, would that be any bar to her location of the scrip upon the land? Most certainly not. It is held, even by Secretary Vilas, that she might locate the same by attorney or agent. She had a right to appoint an agent. She had a right to appoint Eaton. She had a right to deliver the power of attorney to Eaton, either directly or through her agent Mr. Smith, with the donee's name left blank, for the purpose of having the entry made and her scrip surrendered to the government. Whatever transaction she made about selling the land, was her concern.

Notwithstanding the fraudulent practice committed in the interest of the attempted pre-emption filing of Hyde to have her disavow Eaton's authority, she confirmed his appointment and his acts.

No rights of any other persons attached in the interim.

Eaton did not buy the scrip nor take an assignment of it. He was not dealing in the scrip for speculation. He did not want to buy the scrip that he might sell it again. His transaction was directed to the land. He wished that the right under the scrip might be exercised, that the scrip might be located upon the land to the end that for such considerations as might be or were satisfactory to Orillie Stram (with which the government had nothing to do) the land might be obtained through her. Orillie Stram was then interested in the location; the scrip continued to be hers; it always had to continue to be hers until extinguished. The consideration to her depended in whole or in part upon its location. The receipt of any benefits by Eaton, or any other parties, depended absolutely upon its location upon land.

See testimony of Eaton, Folios 324, 332, 336, 337, 339, 340, Transcript.

At Folio 337 on cross-examination, Eaton testified:

"Q. Who did you pay?

"A. I made the first payment to Byron M. Smith, and paid the balance to Orillie Stram March 31st, 1886. I made no payment to her until then. I had agreed to pay her previous to that time. I made the agreement at the time the papers were obtained from Byron M. Smith."

At folio 339 of the Transcript he says, refer-

ring to Byron M. Smith of Minneapolis: "He acted for me and for her. He held her scrip and got new powers of attorney and made the arrangements."

At folio 340 he says he was to pay Mrs. Stram after the location was perfected and the scrip adjusted.

Let it be noted that Merritt, acting as attorney to convey the property, made conveyances of it and that the deed of confirmation afterward executed by the Strams also confirmed all Merritt's acts under his power of attorney. It cannot be denied that Eaton desired to obtain an interest in the land, but we assert that he took no means of doing so that in any manner conflicted with the law or the accepted practice, and the local officers, with full knowledge of the powers of attorney, and all acts done by Eaton, expressly held that the entry was effected in accordance with the usual accepted practice and in acordance with law. (Folio 198, Transcript.)

No subsequent rule, decision or practice of the Department could divest the scripee of the property secured by that entry or deprive her of the equitable or legal right to the title to the land which was thereby secured; her rights became vested at that time under the law and the rules of practice theretofore and then in force.

Belden vs. Midway Co., 107 Fed. Rep., 602.

The fact that the name of the donee was not fill-

ed in in the power of attorney until it was delivered, was of no consequence, if such was the fact. This has repeatedly been held to be of no importance both by the Department and by the courts. For example, see

McDonald vs. Hartmann, 10 L. D., 563.
Hartmann vs. Warren, 19 L. D., 65.
Allen vs. Withrow, 110 U. S., 119.

The government was not defrauded or injured; the half-breed was not defrauded or injured and had said so by her solemn deed after the transactions were completed. There were no intervening rights of other parties. We confidently assert that, as we proceed with the examination of the law and authorities, it will appear that the findings of the local officers were fully justified.

The scrip itself was unassignable. The land had to be entered in the name of the scripee. In the scrip itself the half-breed had nothing she could transfer to another, but her title to the land when perfected was as absolute as tho' acquired in any other way. Any attempt to transfer the scrip would be of no effect; the title to the scrip would remain in the half-breed. *Such attempt to transfer would involve no moral turpitude nor a breach of any legal duty as in case of the transfer of a pre-emptive right, but it simply could not be done and would be ineffectual.*

Gilbert vs. Thompson, 14 Minn., 544.

Coursolle vs. Weyerhauser, 69 Minn., 328.

Midway Co. vs. Eaton, 79 Minn., 450 and 455.

It is not disputed that the scripee could locate the same by agent or attorney. The instructions of the Department quoted at length by counsel for the plaintiff in error, specifically recognize this right.

See 4th paragraph Circular of March 21, 1857; 4th paragraph of Circular of Feb'y 22, 1864.

In the Circular of May 28, 1878, which contained numerous provisions not authorized by the law at all or warranted by its provisions, there was, notwithstanding, found this provision: "The land selected in satisfaction of a certificate or scrip, must, of course, be located in the name of the party in whose favor the scrip is issued, and the location may be made by him or her in person or by his or her guardian or duly authorized agent."

Even Secretary Vilas held that the location might be made by agent, and in Allen vs. Merrill admitted that the improvements might be made by an agent.

On page 217, 8 L. D., speaking of the use of two letters of attorney, one to locate and the other to sell, and the filing of the one to locate only with the scrip, he said: "There is nothing therefore to challenge the bona fides of the transaction, as appears on the surface, or any reason why the land office should not recognize it as a fair exercise of

the right to do by attorney what one might lawfully do by himself."

Therefore, the location including improvements when necessary by an attorney in fact or agent, even upon the authority of Secretary Vilas, must have been valid in the eyes of the Department and in accordance with the practice thereof. So far as another power of attorney authorizing the sale of the premises is concerned, that has nothing to do with this question which we are now discussing. Of course, in no event need it be filed with the land office anyway; it related only to the conveyance of the land after entry, and should and must be filed in the office of the Register of Deeds of the proper county.

On page 219 of the same decision, he said:

> "This case relates to unsurveyed land and a further limitation is imposed both to mark and restrict the personal right of the half-breed to take such land. He is required to have made improvements upon it. The theory of counsel for the scrip claimants is that the half-breed may make improvements by an agent. *This may be granted,* but the difficulty with the case is that the improvements were not made for the half-breed in any sense whatever; they were made for the supposed attorney at his expense, and with no purpose to admit the half-breed to any interest or benefit in connection with them or with the land."

Verily it does seem the Secretary got into deep water with his logic. The beneficiary of the scrip

could, according to the views expressed, locate by attorney in fact, she could sell after location, but if she gave another a power of attorney to sell the land, after it should be obtained, the location was rendered invalid. Having in the Stram case upheld the commissioner who insisted on personal supervision of the improvements and personal contact with the land on the part of the half-breed, here in this case, decided at the same time and published, while the other was not published because this case covered the same ground, he admits that the improvements, to effect a valid location could be made by an agent, but then he says the difficulty is that the improvements are not in any sense made for the half-breed and with no purpose to admit the half-breed to any interest or benefit in connection with them or with the land. That was wholly a matter of the half-breed's concern. If the improvements could be made by an agent in order to effect a valid location, and if they were so made, that was all the Secretary should have been concerned with. Why should his concern reach beyond that point, when except by the act of the half-breed herself she could not be deprived of the use of the improvements if she cared to have a personal use and enjoyment of them? It was not the concern of the government nor of the Secretary. If she did not care to have a personal use and enjoyment of them, she did not need to have the slightest intent to occupy the premises or enjoy the improvements for a single day or hour after location was effected. Anything on the part of the Secretary that went a mom-

ent beyond the matter of valid location, was unnecessary and uncalled for solicitude.

Viewed in this light, the statement was ridiculous, and not only was it so, but it was not true. The law did not require her to live upon the land or to build a house thereon; and he concedes it; it did not require her to enjoy the improvements after they were made and if she made all of the improvements herself, with her own hands, she need not have stayed to enjoy them, however much the Secretary might wish her to do so, but might never see them again. Hence the only real benefit that she would derive from the improvement, if she did not choose to make her residence there, or personally use them, was the benefit of having the land appropriated to the satisfaction of her scrip, in order that she might derive the advantage to accrue to her by way of the disposition of her land, whenever she saw fit to dispose of it. Hence in this sense, which is the only sense in which the government under this law was concerned with it ,the improvements being made in behalf of the location, for the purpose of making the location and for the purpose of completing a valid entry of the premises, she was interested in the improvements, and they were in that sense made in her behalf, no matter whether they were paid for by her or by her agent. And this must have been in accord with the departmental practice prior to the decision of Secretary Vilas for an examination in the land department of entries made under this law, to which we have referred, disclosed scores of cases where the improvements

were made by an attorney in fact, for the purpose of effectuating the entry in the name of the scripee and securing the land to be patented to her.

The Supreme Court of Minnesota on page 456 of the decision in this case says:

> "It was error to hold that under the act in question it was vital that the scripee should see the land or the improvements prior to the entry, and that the agent could act in her behalf when duly authorized, not only in selecting the land itself, but in making such improvements as would in themselves, and without regard to their value, be notice on the ground of an assertion of a prior right. It was error to hold the scripee had nothing to do with these improvements for she had empowered her attorney in fact to make them; it was error to hold the scripee must have direct connection with the land, and if by his decision that the scripee must claim the land for her own personal use, the Secretary meant that such claim must be formally made, or made in good faith, or must be established by proof other than or different from that before the land department in this particular case, he was in error."

If then there was no restriction upon the alienation of the land, if the half-breed could before its acquisition authorize its alienation after location; if the scrip was unassignable and any attempt to assign the same was free from moral turpitude but was simply ineffectual; if she could authorize another to locate the scrip and do all things necessary to effectuate the entry; if no rights of other parties

intervened or attached; if the scrip was tendered by an authorized agent, accepted by the local officers and afterwards the entry was fully ratified, how can it be said that the entry was not valid? How can it be said that the contract which the government made by means of the Act of 1854, was violated?

By the acts here done by Orillie Stram, why had not the government been put to its performance of its part of the agreement? What was there to affect the validity of the entry? The Secretary held that these acts evidenced an assignment of the scrip, a thing which the half-breed could not do. *In other words, he held that a thing which she could not do, operated to defeat a thing which she could do and which, in accord with the practice, had been actually done one year previous without any contest or conflict of interest, to the entire satisfaction of the local officers and to her own satisfaction and which operated to give her what the government had contracted to give her.*

Suppose, for illustration, Eaton wanting this land, had gone to Orillie Stram and said to her: "You hold Sioux half-breed scrip and have a right to take land under it. I have my eye on a piece of land which I would like to acquire, or acquire an interest in. You come and place your scrip upon the land and locate it and I will buy the land from you for $5,000." Suppose she agreed to this and suppose if you will they reduced the agreement to writing, and then she came personally and if the land

was already surveyed, located her scrip and the entry being allowed, then conveyed the land to Eaton. Would the transaction be good? Would Eaton's contract be a valid one if therein she had agreed to sell and convey the land after she obtained it? Under the decisions of the courts which we cite, yes; under the decision of Secretary Vilas in Allen vs. Merrill, 8 L. D., 207, which is but the same thing as his decision in this case, the whole transaction would be void.

Although Mr. Vilas, page 216, says: "There was no restriction put upon the half-breed's power of alienation of the land when it should be located," and although he says, page 220, that "the fee passed out of the United States when the location was made," yet such a transaction would fall under the ban of the decision as operating to effect an assignment to another of the scrip and the right to locate. All of the reasons which are given (see bottom p. 218 and top p. 219) commit him to that conclusion. But could there be any shadow of doubt under any intelligent construction of the law and under the decisions hereinbefore cited, that such a transaction would be absolutely valid? Why, if no settlement was required, if there was no restriction upon the alienation of the land itself, if the half-breed could sell the land at once upon location being made, if she could contract in advance for its sale, why is there anything illegal in the transaction? Is any wrong done to the United States or to the scripee? In what respect has the law been violated?

But, although the Hon. Secretary made the declarations which necessarily commit him to the conclusion that such an entry made under such circumstances would be invalid, he somewhat draws away from resting his decision upon this and retreats beneath the shadow of the improvement clause.

Now suppose Eaton had gone to Orillie Stram and said the same things as above suggested, but also said: "The land is unsurveyed, some improvements must be made upon it; I will attend to the making of the improvements for you." Suppose as a part of the deal he had agreed to pay for the improvements, if you will. These improvements, Mr. Vilas agrees (page 219) might be made by agent or attorney, and although he holds on page 220 that the title passed out of the United States upon location being made upon unsurveyed lands, and holds that there was no restriction upon alienation after location, yet he nevertheless strongly holds that these improvements must be made for her personal use and benefit and that she must have direct contact with the lands. Why so, if there was no restriction upon the alienation of the land? If no residence or occupancy was required, and there was none? Why, if she might make the improvements by agent need she therefore go upon the land at all? The improvements were made in the interest of the location. Was anything more required? Why, especially if the title passed as he says it would, upon the location being made upon unsurveyed land,

was it necessary that these improvements be made under her personal direction and supervision or for her personal use and benefit, when she could sell the land the next moment without an hour's residence upon it or an hour's enjoyment of these improvements which are so necessary to be made in his view for her own sole personal use, convenience and enjoyment?

The contention is wanting in reason or logic and has no support in law. The Secretary only assigns two reasons for his ruling:

1. That it would circumvent the law and in effect operate as an assignment of the scrip;

2. That it was in violation of the land office circular requiring personal contact with the land and he also thinks it would make the right too valuable.

But if congress put no limitation upon the lands which might be purchased with the scrip, the Secretary could not do so. He seems to think (p. 219 Allen vs. Merrill) that, aided by the white man, the scrip may thus be made to purchase more valuable lands than might be selected by the half-breed or Indian upon which to erect his tepee.

Congress knew as well as the Secretary that there were white men in this country. Because there were white men who wanted the Lake Pepin lands, it said "give up these lands and you may go anywhere in the public domain and take other lands," and the act was wanting in a single sen-

tence that required a severance of the tribal relations and the separate scattered residence of the half-breeds and mixed bloods upon the lands which might thus be taken. So the purpose of the act was not to make individual farmers out of these people. Had any such requirement been imposed, no surrender of the reservation would have been obtained by the government and there would have been no course left except either maintaining the half-breed reservation or a forcible removal of the half-breeds and mixed bloods therefrom in violation of the solemn contract of the government.

After all, to cite Allen vs. Merrill is equivalent to counsel citing the decision of the Secretary in this case, for both were rendered the same day, one not published because the other was and because the decisions were practically one and the same thing; and while he relies upon the decision we complain of and introduced it in evidence, and while we have a right to extract from it what we can in the way of admissions and concessions which cut the props from under it, yet it cannot be cited as a precedent for itself and no more can Allen vs. Merrill be deemed a precedent or legitimate authority to cite as such to the court in this case.

In the case of Felix vs. Carroll unpublished, decided in the Department of the Interior in 1862 and 1863, it was claimed that Sophia Felix did not herself make the location and that it was not made for her benefit; that the real beneficiary was not the

scripee but one Patrick who desired to obtain the land. Witnesses had testified that no such person as Felix, the scripee, was known or was in existence and that the real beneficiary was Patrick. The Commissioner held from the evidence that he deemed that the location was not made for the benefit of the scripee and was invalid. He held first that Felix was not resident upon the land and had made no improvements thereon at or before the date of location. Second, that the location of the scrip, though made in her name was not made by her in person or by her duly authorized agent for her use and benefit, but by unauthorized persons and for the use and benefit of persons having no legal interest therein.

Judge Otto, who rendered the decision as Assistant Secretary of the Interior, was probably as competent a jurist as any person who has occupied that office. He held the location to be good, overruling the Commissioner, and said:

> "It is in the cases where unsurveyed lands are claimed by a half-breed that improvements are requisite as an antecedent to the right of location, and I therefore do not regard your first objection to Felix claim as sanctioned by the law.
>
> "As to your second objection, I remark that this kind of scrip is by the law declared to be unassignable. In this case Sophia Felix has signed the application to locate her scrip. The signature must be treated by us as genuine when there is no proof to the contrary, and when she has made no complaint against the use of the scrip. The fact that the scrip was carried to the land office and the business

transacted by another person does not affect the validity of her interest in the land.

"As the certificate of location issued in her name, and the patent will issue to her, neither the register's report nor the affidavits of third parties can be admitted to establish the interest of any other person in the location.

"We could not recognize such interests if an assignment in writing was produced and duly proved to have been executed by the half-breed. Whether she could sell or did sell the land after the location of her scrip, we need not inquire, and the validity or effect of any such sale or assignment must be left to the arbitrament of the courts of law. The location is valid on its face, and the owner of the scrip so far as she is represented at all, demands the patent to issue in her name, and my decision is that she is entitled thereto."

Mr. Harris will print this decision in full as an appendix to his brief.

This case strongly enforces the proposition that neither any attempt to do an impossible thing in the way of assignment of the scrip, or any transaction or attempted transaction relating to a sale of the land could have any effect upon otherwise valid acts in the way of effecting a location. This is necessarily true for there was no forfeiture of the scrip.

The method adopted in the location of this scrip was in accord, not only with contemporaneous construction then placed upon the act, but was in accord with the uniform practice of the land department until the contention arose in this case, and we

think it may be said that such course has had judicial recognition in such cases as:

Marks vs. Dickson, 20 How., 551.
Gilbert vs. Thompson, 14 Minn., 544.
Hope vs. Stone, 10 Minn., 141 (Gil. 114).

And upon principle in other cases hereinbefore referred to.

In Hope vs. Stone the half-breed having possession of the piece of land within the reserved tract had sold it to another, conveyed it by quit claim deed and given a contract for further conveyance at a future time. The title and rights thus granted had passed by subsequent transfer prior to the passage of the Act of 1854. After the passage of the act the half-breed located the land and conveyed it pursuant to the requirement of her contract. The contention arose between subsequent grantees, based upon the claim of the invalidity of these first transfers and agreement. The court says:

> *"It is not claimed that there is any statute specifically prohibiting such transactions or by which they are expressly claimed to be void. There would appear to be no illegality in an agreement to convey the lands when title should have been acquired, although at the time of the execution of such agreement, the title shall be in the United States."*

Fackler vs. Ford, 24 How., 323, sustains this

case. In the case of Marks vs. Dickson, the court held that the assignment of the floats before entry was void, but that power of attorney to assign given before location would support an assignment of it made after location.

We submit that the subject of the controversy was the land, not the scrip. The scrip could not be sold as such and even if actual formal assignment had been made of it and made of it repeatedly, still if presented by Orillie Stram or anybody acting in her name and behalf it was subject to location on the land. *There was no forfeiture of the scrip worked by any assignment thereof.* The scrip was always good and locatable by, in the name and in behalf of Orillie Stram. It will not be claimed that if she had made an actual assignment of it she could not still go and locate the land herself. If she could do this she could locate the land by agent. Suppose she had assigned her scrip to Eaton, and Eaton had tendered a filing in his own name it would have been refused because the assignment would have been invalid; suppose he had thereupon produced a power of attorney to locate it and tendered it in her name. It would have been accepted. The government would not be concerned with her intentions about selling the land, nor with any conveyances made by her thereof. She had a right to agree to sell the land even before it was located or to give another a power of attorney to sell it; and all of the contentions that might arise by reason thereof were contentions, if they existed at all, between the parties.

We invite the attention of the court to the strong reasoning of the trial judge in his memorandum on this point. (Folios 867 to 873, Transcript.)

The Method Adopted was in Accord with the Practice of Long Continuance in the Department.

This was especially true in this section and the northwestern districts, and the decisions of the local land officers show that the method pursued was in accordance with the practice and hitherto interpretation of the land department. It has been estimated, by those who are familiar with the accepted course pursued, that fully two-thirds of the Sioux half-breed scrip was satisfied and extinguished in this way. We are told that a search in the files of the Department, made at about the time of this hearing before the Secretary, which included all adjudicated cases and covering every state where rights under the law were exercised, failed to disclose any case to sustain the view taken by Secretary Vilas, and if any have been cited by counsel for the plaintiff prior to Allen vs. Merrill and the case at bar, we have not been advised of it. No case was found either that held the Secretary's view that a good scrip location could not be made upon the land if it had been surveyed, because there had been an attempt to locate the scrip on the land in its unsurveyed condition.

The examination reached from 1859 to 1889

and disclosed entries upon both surveyed and unsurveyed lands, made both in person and by attorney in fact, and where no improvements had been made and where they had been made by attorney, little regard being given to the matter of improvements where there were no adverse rights attaching.

We submit then, that if the method pursued by Mr. Eaton was in accordance with the then and hitherto existing practice, that no new departure from that practice thereafter should deprive defendants of their rights. If what he did was in accord with the law as actually administered at the time the locations were made, these rights should not be disturbed, and any change in the construction of the law as then and theretofore administered, should not be applied to extinguish rights already acquired under the former practice.

United States vs. Arredondo, 6 Pet., 691.

Case of Chas. P. Masterson on Review, 7 L. D., 577.

Germania Iron Co. vs. James, 89 Fed., 818.

Belden vs. Midway Co., 107 Fed., 602.

We submit then, that the purpose to sell and dispose of the scrip is not shown upon this record and as no sale of the scrip could be made in any event no sale of it could be shown. The purpose was to obtain the land under and by virtue of this

scrip in satisfaction thereof, in the name of the scripee and whether it was for her benefit for the purpose of sale or for the purpose of occupancy, the government was not concerned.

All of these cases show that the government prior to Commissioner Sparks' decision, had never concerned itself therewith, nor was the government concerned with the question of whether the half-breed intended to sell the land at once or to hold it, or whether she had already made a contract to sell it or intended to keep it, nor whether she had given another a power of attorney to sell it, nor whether she had been paid in part or in whole for the land. The government was only concerned with: (1) Whether the scrip was genuine; (2) whether it was presented by an authorized person; (3) whether it was laid upon lands applicable to its extinguishment. There has never been any contention in this case on the first and third grounds. Nor was there for a year after entry any on the second, and then only by virtue of the fraudulent allegations of Hyde which were entirely removed before hearing. What interest, then, had the government in the transaction? What power had the Secretary to say the entry was not valid? There is but one answer: None. The entry was valid.

V.

The Location of the Scrip on July 21st, 1885, Upon the Surveyed Lands was a Valid Location Thereof Without Regard to the Question of Improvements, Even if the Attempts at Previous Location Upon the Land Unsurveyed Should be held Unavailing.

If the Commissioner and Secretary were correct in insisting that in order for the half-breed to locate upon unsurveyed land, she must have personal contact therewith, it was no reason why the entry should not have been sustained as an entry upon surveyed land at the date of adjustment.

The Hyde claim did not originate for a year after the scrip location and the lands had been segregated by such location from the mass of the public domain. Belden vs. Midway Co., 107 Fed., 601. Hyde's claim having been declared corrupt and absolutely invalid and giving him no rights whatsoever, removed all intervening claims so that on July 21st, 1885, when this scrip was adjusted to the lines of the survey, the land would stand the same as though there had never been any other claimant thereto.

If the land was such land as could then be subjected to the extinguishment of this scrip, there

would be absolutely no reason why the location of the scrip could not be made thereon at that time, as surveyed land, without any reference to the question of improvements. Unless there were some valid, existing adverse claims lawfully asserted, which had so far attached to the land as to remove it from location as surveyed land, this must necessarily be true. It has been decided that there were not any such claims. The decision of Secretary Vilas complained of in this case, did not pass upon this question, but in the case of Allen vs. Merrill, page 221, the Secretary held that the adjustment of the scrip to the survey was but an adjustment of the boundaries in perfection of a location previously made and was not an original location of the scrip. But if the land was subject to be taken in satisfaction of this scrip and subject to be taken at this time as surveyed land, what further acts were necessary to take the land than to apply for the same and surrender the scrip in payment therefor, and receive, as was done in this case, the receipt of the Register and Receiver therefor. The scrip had been surrendered to and was held by the government and the form of application was sufficient. (Folio 510 Transcript.)

There was no forfeiture of the scrip by reason of any previous attempt to locate. What reason would there be for the government to say Here is your scrip, you may take any land within the public domain, except this tract which you have already made a futile effort to take. This you cannot take, although there are no intervening rights and although

anybody else can take it with like scrip. What sense would there be in saying you can not take this land with this scrip without you first withdraw it, and we hand it back to you, then you can again hand it to use and we will let you take this land therewith?

we submit that to deny the validity of the location as a location upon surveyed lands and to state such grounds therefor, is to assign, not a reason for a decision, but an excuse for want of a reason.

It seems to have been the rule in the administration of the disposition of public lands that if at the time the final act requisite to patent is done, the claimant is qualified to do it and lawfully does, and performs the act, that it relates back and validates the transaction, without regard to whether every step in the procedure has been regular, unless some valid adverse claim intervenes.

Thus, a pre-emptor who has not in the first instance complied with the naturalization laws, if he does so before the time to make his final proofs and no adverse claim intervenes, the validity of the claim thus established is recognized. (Decision of Secretary Vilas re Jacob H. Edens, 7 L. Dec., 9.) It has also been held that a failure to file a declaratory statement will not perjudice the rights of the settlement in the absence of an adverse claim.

Various of these land laws impose conditions which the government does not take advantage of, except where an adverse claim is recognized. The

Land Decisions are full of cases which evidence this practice. We cited a number of them to the trial court but do not deem it worth while to make selections of cases on this question on this appeal.

Kelly vs. Quast, 2 L. D., 627.
Ry. Co. vs. Painter, 6 L. D. 485, will suffice.

As seen in 8 L. D., page 220, Mr. Vilas has said that a valid entry on surveyed lands passes the title at once to the locator. He has also gone further and said that this would also be true as to a valid entry on unsurveyed lands, from which it may be inferred that he intended to make the deduction that inasmuch as entries upon surveyed and unsurveyed lands were both provided for in the same section, that there could not be upon the same land, an entry under both provisions, even though the entry as unsurveyed land should be held void.

Without at this time discussing the question whether the title would pass at once upon location of unsurveyed lands, the rights of the locator would at least attach thereto and remain intact, until the lands were surveyed and the location adjusted thereto, if the location was valid, the adjustment relating back so as to protect the rights of the scripee as of the date of the first entry. But if it is contended that the first location was not valid because of the want of improvements made by the scripee in person or under her personal supervision and direction, or by reason of any other

infirmity not common to both entries, we contend that the entry was a valid one as upon surveyed lands, and that the previous attempt would be no bar.

The record shows that Eaton made the application on July 21st, 1885, in the name of Orillie Stram, as her attorney in fact, to adjust this scrip to this land and that in the form of that application is contained the phraseology "hereby apply to locate and do locate" the scrip on the tracts, describing them by legal sub-divisions as designated by the survey. (Folio 510 Transcript.) True enough these applications relate back in their references to the location made in June, 1883, on the land in its unsurveyed state, but what was done on July 21st, 1885, was in all respects sufficient to operate as a location and tender of the scrip for the land, and contained all that was necessary for an original application to contain, and if the lands were then in a condition to be disposed of upon proper location of the scrip of this class, and the location thereof would exhaust and extinguish the scrip then it is a good and valid location of the scrip upon the surveyed land.

If Orillie Stram, either in person or by agent could that day have successfully applied for this land in the first instance, had she never made any previous attempt to obtain it, what reason exists by virtue of the fact that she had tried before and failed while the land was unsurveyed, if that was true, to prevent her from obtaining it?

We submit with unlimited confidence that unless there was some other infirmity in the final attempt to take this land, there being no forfeiture of the scrip, no fruitless attempt to obtain it before could deprive the acts of Orillie Stram, through her agent Eaton, on July 21st, 1885, from effectuating a valid entry of this land as surveyed land.

Without waiving any of our contentions under previous heads, we say that there was a good location made here of surveyed lands, and that by reason thereof the only question upon which the Commissioner rested his objection to the entry was removed.

Whether the title which passes to a scripee upon completion of the location is a legal one or only the equitable one, if we have shown that in the exercise of supervisory power, vested or assumed, the superior officers in the land department have reached their conclusion by finding facts not established by the record and by an erroneous interpretation of the law, and have based the same upon regulations made by themselves rather than requirements embraced in the law, then it results that the conclusion of the local land officers was correct and the entry was regular and proper and that the title, either the legal title outright, or if not, at least the full equitable title, vested and no amount of jugglery therewith subsequently in the Department could affect or extinguish the rights of the scrip claimants.

In this connection the language used by the

court in Germania Iron Co. vs. James, 89 Fed. Rep., page 818, in the closing of the decision, seems an appropriate characterization of the attempt to exercise supervisory power in this case. The language was used with reference to the Department suddenly adopting a departure from what had theretofore been its settled practice. The court said:

> "What a farce the attempt to secure rights in a judicial tribunal must become if its rules of practice are applied at the arbitrary will of the judge who presides over the court. Under such an administration of the land department the rights and titles, which the law attempts to protect and secure, become naught but privileges dependent upon the gracious favor of its officers. The power to degrade them to this rank cannot be found in the supervisory authority of the Secretary or Commissioner; their power of supervision is not unlimited or arbitrary. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the person secures a vested interest in the property and right to a patent therefor, and can no more be deprived of it by order of the Commissioner than can he be deprived by any such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

VI.

The cases Cited or mentioned in Plaintiff's brief do not Support its Contention nor tend to Confirm its allegations of error. On the Contrary, the whole course of judicial Determination Sustains the Contention of the Defendants.

We cannot know whether counsel will cite the same cases in this court as in the court below, but must assume, in the absence of access to his brief, that he will do so.

Decisions from the land department were first cited and counsel commenced with Allen vs. Merrill, 8 L. D., 207, decided Feb'y 18, 1889, and put it almost bodily in the brief. This case and the Stram case were argued and considered together. The decisions were promulgated at the same time; this was published, the other was not. Next these same cases are quoted at length on review. So far as the office of an authority is concerned, these decisions cannot be considered as such. They do not evidence any prior holding of the Department which was followed as a precedent or which should be heeded by those then doing business with the Department. Their correctness is on trial and the first time they have been put to the test in the courts, they have suffered, and counsel, who seems

to have relied almost wholly on them, has been surprised and disappointed.

As we have said elsewhere, the reasoning of these decisions is a proper subject for discussion, but they cannot be accorded weight as authority. It may be mentioned in passing that in Secretary Noble's decision on review in Allen vs. Merrill, 12 L. D., on pages 155-6, he refers, among other, to the cases of Josette St. Germain, scrip No. 628A., and Nancy Rock, Scrip No. 94C. It is somewhat interesting to note that in both of these cases there was a power of attorney which both authorized the location and the sale of the land thereafter, and Secretary Noble held it good and said there was nothing to challenge the bona fides of the locations. How fortunate it was that both powers were on one piece of paper and run to the same man; if they had been upon two papers, they must surely have been bad, according to the decision of Mr. Secretary Vilas. It is also interesting to note that in this case Mr. Secretary Noble, after reciting the provisions of the law of 1854 said, on page 150:

> "It is perfectly plain to my mind as a matter of original construction, that by the act of congress the scrip in question was intended to be the evidence of a purely personal right in the half-breed to locate and receive patent for the number of acres of land therein called for. That this is true is clearly shown by the declaration in the act that no transfer or conveyance of the scrip shall be valid. If the scrip could not be legally transferred or assigned, it must necessarily follow

that it could not be used as a means to acquire title to lands by any person other than the half-breed himself, or by his agent or attorney. It was, therefore, obviously intended for the sole benefit of the half-breed; it could be lawfully located only by him in his own person or for his sole use and benefit by his legally constituted agent or attorney. These propositions will scarcely be seriously questioned. They are the result of the clear and unambigious provisions of the statute."

He then said that it was clear to his mind that the entries in question were not made by the half-breeds in person nor by their legally constituted agent or attorney, nor for their sole use and benefit, and on page 153 he says:

"That a power to sell may extend to lands afterwards lawfully acquired by means of scrip, is not attempted to be controverted," and on page 154, referring to the case of Sophia Felix he said: 'In that case there was nothing to show that there had been, in fact, a transfer of the scrip by Felix, half-breed,' and on page 155, he said: 'It is not denied that improvements may be made by an agent.'"

So that, Mr. Secretary Noble is found to have declared in these statements that a power of attorney to locate and a power of attorney to sell, given before location, are both valid and may be contained on the face of one and the same instrument; that it is a valid thing to do to locate by agent or attorney; that it is equally valid to make improvements

by an agent or attorney. It would seem then, that so far as the Stram case is concerned, it would be difficult to find lodgment in his mind for a determination adverse to the Stram scrip location, for Eaton was specifically authorized to locate the land for her, and to do all things necessary to effect a valid entry, and, unlike Secretary Vilas, it is no objection in his mind that a power of attorney was given to a person to sell the land after obtaining it. Eaton had made an arrangement by which this power of attorney was given just before the location and improvements were made. A certain amount of money was paid, more was to be paid after the entry was completed and she had affirmed the same and conveyed the land.

If improvements could be made by an agent, personal contact was not necessary. It appeared on the face of the power that Eaton was authorized to do all things necessary to make the location, and the evidence shows that he made these improvements, or caused them to be made for the purpose of effecting the location. Clearly then they were made by her duly constituted attorney in fact. What was there left by which, so far as this case is concerned, Secretary Noble could reach an adverse decision? It can only be found in the statement that, in his view, as a matter of original construction the act conferred a personal right and that because of the prohibition against the assignment of the scrip, it must follow that the scrip could not be used as a means to acquire title to lands by any other person than the half-breed himself, or by his agent or

attorney, and that it was, therefore, obviously intended for the sole benefit of the half-breed and that the land could only be located for his sole use and benefit; all of which, he said, is the result of the clear and unambiguous provisions of the statute.

This logic is beyond comprehension, that the half-breed could make the improvements and could locate by attorney in fact or agent, could give a letter of attorney before the location to sell the land when it should be located; did not need to live upon the land an hour; had a perfect right to sell it the minute it was located and, before its location, to authorize a sale, and yet, at the same time, must take the land and receive patent therefor, for his or her own personal use and benefit. We submit that this reasoning is absolutely contradictory of itself. So far as he says that the land must be taken only by and in the name of the scripee, either in person or through an authorized agent or attorney and cannot be located by any one else, because of the provision against the assignment of the scrip, he is clearly right, but, we submit, that he cannot go beyond that and still be right, nor go beyond that without contradicting his own premises. His holding in effect is that the provision with reference to the assignment of the scrip is prohibitory of any alienation of the land until patent is received.

In the Stram case, on review, which immediately follows the case of Allen vs. Merrill in the 19 L. D., Secretary Noble did not re-discuss these

questions, but substantially passed the case upon his opinion as given in the case of Allen vs. Merrill.

Taking the decision of Secretary Vilas in connection with these decisions on review, we learn with reference to these matters the following things:

That the land is granted to the half-breed without any restrictions upon his alienation thereof and as to surveyed lands, he need never see them, and that he may sell the lands as soon as location is complete;

That it is the unambiguous provision of the statutes that the right to take these lands and receive patent therefor is a personal right, and that the same can only be taken for his own use and benefit;

That as to unsurveyed lands he must have personal contact with the land and that the improvements must be made by him or under his personal supervision;

That the improvements may be made upon unsurveyed lands by an agent or attorney in fact, and as he can sell the land as soon as location is complete that, in such a case, he need never see the land;

That there is no requirement that a house or habitation be built upon the land;

That the improvements must be for his own personal use, benefit and enjoyment;

That it is perfectly competent and leaves nothing to challenge the bona fides of the transaction to

give a power of attorney before location authorizing the location and the sale of the land thereafter;

That to give two powers of attorney, one to locate and the other to sell, renders the whole transaction invalid, including the location;

That to give powers of attorney to locate the land and to sell the same operates to work an assignment of the scrip and hence invalidates the authorized act of location, altho' the same is made in the name of and for the half-breed;

That the half-breed is unable to make an assignment of the scrip; that such a thing is impossible.

We freely confess our inability to find any element of consistency in these conclusions.

The other four cases in the land department decided subsequently to Allen vs. Merrill which have been referred to by counsel, simply apply the ruling of Allen vs. Merrill, and hold that in order to make valid a location on unsurveyed lands it is necessary for the Indian to have made or caused to be made improvements on the land for his own personal use and benefit. As they cannot be of any force in determining the rights of these parties, it is not worth while to refer to them.

We cannot refrain, however, from noting a remarkable passage which occurs on page 372 in the case of McGregor vs. Quinn, 18 L. D., which is as follows:

> "Clearly then, under the law, the rules and the departmental decisions, it is incumbent up-

on the Indian to identify himself with the land in such a way as to show his good faith in availing himself of the bounty the government has bestowed upon him, by making or causing to be made for his own personal use and benefit improvements on unsurveyed lands prior to the location of his scrip."

The clerk who wrote that decision (we do not have the honor to know whom the initial letters on the opinion designate) has the notion that this Act of 1854 made a GIFT to the Indian as a mere bounty on condition of his *settlement and occupancy.* These later land decisions announce no principle and tender no reasoning. They are decided on the strength of Allen vs. Merrill and in one of them at least it is held that where two powers of attorney, one of them to locate and the other to sell, were given, that it worked an assignment of the scrip and that the entry should be cancelled. If the power to locate and also thereafter to sell had been upon the face of the same paper as in the cases approved by Mr. Secretary Noble, perhaps the writer of this opinion would have held the entry good. He said the double power of attorney worked an assignment of the scrip. Again we suggest that this was impossible. The scrip could not be assigned. The scrip was tendered in the name of the scripee. The writer of the opinion must then have concluded that the government did not intend to allow the half-breed to take the land unless he kept it. He may possibly have been of the mind that the act contained such provisions as the treaty in-

volved in the case of Smith vs. Stevens, 77 U. S., 321, prohibiting the alienation of the lands allotted to the half-breeds. Clearly he had no proper conception of the act in question.

In another of these cases, that of John W. Poe, 29 L. D., 309, an assignment of the scrip in form was made and the entry had been made in the name of the assignee, which the land department refused to affirm.

The case of Felix vs. Carroll, decided by Otto, we may pass by with the consideration which we have given it elsewhere and with the consideration given it by the trial court in his memorandum, with the declaration that it is an affirmative authority in support of all of the contentions of the defendants in this case, and that it stood unchallenged, until the decision in this case. (See Appendix B, Mr. Harris' brief for defendants Eaton and Lonstorf, for this decision in full.)

Murphy vs. Jones, not published, was printed in full as Appendix D to plaintiff's brief in the Supreme Court of Minnesota, page 146, and also again nearly in full at page 57 of the brief. In that case the contention was simply between a settler of the land and the locator of the scrip. The locator claimed he had plowed a half acre of ground. The settler came a year later and saw no improvement, was not apprised of the location of the scrip, settled upon the land, built two houses, fenced thirty acres, cultivated a considerable of the land, dug a well, etc. The Secretary held that there were no improvements sufficient to entitle the scripee to lo-

cate the land. *They had been so slight that they did not serve the purpose of giving notice to the settler and to avoid conflict,* and the Secretary awarded the land accordingly. There is absolutely nothing else in the case.

The case of United States vs. Chapman, 25 Fed. Cases, 407, s. c., 5 Sawyer, 528, absolutely decided nothing else than that Sioux half-breed scrip could not be located on lands already occupied by another, and that the land, at the time it was attempted to lay the scrip, was occupied with valuable improvements thereon by one Mrs. Polack under valid selections of land through a grant to the state, the location in her behalf made in pursuance of the law, having been approved by the local land officers. In a recital prior to a consideration of the real question at issue, where the court was stating the explanation which had been made of the presence of the scrip which had been pigeon-holed in the land office, it was merely mentioned that Chapman had made an attempt to locate the scrip on the land in 1866, but that inasmuch as the Indian or half-breed never lived on the land or resided in the state, the land being unsurveyed, no such location could then be legally made, and that is the language the counsel sees fit to quote. The attempted entry, whatever it was, of 1866, was not on trial. The scrip entries in the land office had been examined prior to the time of Mrs. Polack's entry, and it was found that there was no entry on the land. Afterwards, in 1868, the scrip was found in the land office and it was explained that there had been this

previous attempt and that the scrip had been mislaid, and an attempt was then made to locate it in 1868 and, by certain erasures, to place it ahead of Mrs. Polack's selection of the land. This was the attempted location which was on trial. It was found incidentally in the case that Chapman had no power of attorney to locate the scrip, but the court held that at the time of the attempted location thereof the land was occupied and improved by another and that the scrip could not be located upon occupied lands except within the reservation in Minnesota on behalf of the occupant. We cannot find any explanation for the citation of such a case in support of the plaintiffs' contention, unless it is done on the theory that the courts would never look at the decision.

Rose vs. Wood and Lumber Company, 73 Cal., 385, was a case arising upon Soldiers' Additional homestead entry, the question being whether the right to locate a soldiers' additional homestead was assignable and whether provisions of the homestead act restricting the right of location were applicable to the grant of the additional homestead right. The court held that such restrictionary provisions including residence upon the land were not applicable and that the right was assignable and that the right of alienation existed unless expressly prohibited and the court then said:

> "In all cases where it has been the intention of congress to prohibit the alienation by the beneficiary, such intention has been clearly expressed. Thus the act of congress of 1854

under which the Sioux half-breed scrip was issued provided expressly that no transfer or conveyance of the certificate should be valid."

Why should this case be cited by plaintiff? The law of 1854 itself expressly said that the certificate or scrip was not assignable. The Supreme Court of California holding that in the case of soldiers' additional homesteads the law did not restrict the assignment of the right, referred to this provision of this law. Nobody is here claiming that the scrip is assignable; on the contrary we have repeatedly stated that it could not be assigned.

Gilbert vs. Thompson, 14 Minn., 544, is the next case referred to. We have ourselves already referred to this case. The trial court, in its memorandum, has quoted from it and it needs no argument to show that this decision strongly supports the contentions of the defendants that while the scrip could not be assigned there was no prohibition on the alienation of the land and nothing to prevent the half-breed from giving to another a valid power to sell it when it should be acquired even before the land is located and consequently nothing to prevent the half-breed from making the contract in advance herself to sell the land.

Thompson vs. Myrick, 20 Min
is the next case referred to. In t
was attorney in fact of certain n
certain half-breed scrip. As such
he was empowered to locate the same. He made a contract with one Benjamin Thompson for the con-

sideration of $2800 to be paid by Thompson whereby he placed said scrip and powers of attorney in the hands of said Thompson with the view of locating the same in the name of the minors and agreed upon the location of the scrip to secure the title of the land to be vested in Thompson, in other words agreed to sell it to him. Thompson was to secure the payment of the note which he gave, upon the land. Pursuant to this agreement the scrip was located in the name of the minors by Myrick, as their attorney in fact, upon the lands which Thompson was then occupying and which were the subject of the transaction. After it was entered, however, Myrick caused the same to be conveyed to his wife. Thompson showed that Myrick still controlled the land or portions of it; that Myrick had never tendered him a deed; that he had been willing to pay the note and had so advised Myrick; that Myrick had demanded payment of the note and at one time had offered to convey four-fifths of the land upon payment of the note although he had not tendered a deed; that he offered then to raise the money and pay the note provided Myrick would convey the whole of said lands to him or give him security to protect the title to the rest of the lands, which Myrick refused to do. The court below found that Thompson was entitled to judgment directing and decreeing that Myrick and his wife convey to the plaintiff certain of the lands. It was claimed that the agreement was void as contravening the provision of the act against the assignment of the scrip and that it was further void because it contemplat-

ed the location of the scrip upon lands other than those upon which the scripees had made improvements. The court said that as to the point that the only object of the contract was to accomplish a transfer of the scrip, there was nothing to distinguish the case from Gilbert vs. Thompson, 14 Minn., 544; and that as to the other question the requirement as to improvements was as to "other unsurveyed lands" not as to "other unoccupied lands" and that when Thompson had surrendered this land to the location of the scrip that he had abandoned his occupancy. Other questions were raised in the case and the court said that as Myrick's relation as attorney in fact to locate the scrip ended upon such location, it could conceive of no reason why Myrick was not at liberty *either before or after the location was made* to enter in an agreement to secure title to the plaintiff upon the payment of an agreed consideration. Clearly so far as this case has application to any of the questions involved in the case now before the court it is favorable to the contentions of the defendants.

Coursolle vs. Weyerhauser, 69 Minn., 328 has been cited.

In this case a half-breed minor twenty years old but representing himself to be of full age, holding Sioux half-breed scrip issued under this Act of 1854 had agreed to sell his scrip to one Dorr and executed two powers of attorney, by one of which he appointed Dorr his attorney to select and locate the land and by the other appointed him his attorney to sell it. Dorr acting under the powers had

entered and conveyed the land. Afterwards the entry was cancelled because the plaintiff was a minor and he then executed another power of attorney to enter the land, being then 28 years old. On this entry patents were issued. The contention of the defendants was that the plaintiff was barred from claiming the land, first, by laches, second by abandonment, third, by estoppel, and the court said that the facts presented strong equitable reasons in favor of the contentions although the court said that the defendants could not be claimed to be innocent purchasers as they were charged with full knowledge of all of the means by which the title was obtained. On page 331 the court uses this significant language:

> "In view of the usual manner of dealing with this half-breed scrip and the land entered or to be entered with it, which are matters of common knowledge, it is evident that the defendant intended to and supposed he was disposing of all of his interest in the land entered with the scrip and that he always supposed he had done so until some undisclosed influence induced him to assert the contrary after the lapse of a quarter of a century."

The court then said that his execution of the second power in 1878 with full knowledge of what had been done and of the purpose for which the power was desired, followed by his omission for 17 years to assert any claim to the land while others were paying the taxes on it and dealing with it on the faith and validity of the title would seem to

make a strong case of laches and of abandonment of the land but said they did not place their decision exclusively upon that ground and held that the doctrine of ratification was applicable. We submit to the court that this decision tends to sustain the contentions of the defendants in this case both on the matter of the usual dealing with this scrip and that by such a course the *interest in the land is parted with* as well as on the point of *ratification and confirmation.*

The quotation which plaintiff's counsel has heretofore made from this case is not of matters which the court decided but of matters which the court recited might be conceded for the purpose of the argument and yet be ineffectual to sustain Coursolle's claim to the land. Counsel did not see fit to quote the further statement of the court, made in the same connection to the effect that it might be conceded that when the land is entered with such scrip it becomes the property of the scripee unaffected by any prior acts or contracts on his part and that the act of congress merely provided that "no transfer or conveyance of any of said certificates or scrip should be valid" and further that an attempted transfer of such scrip does not involve any moral turpitude or any breach of legal duty but is simply ineffectual. *These statements of the court are further in support of our argument in this case that no act that the parties could do would affect the validity of the entry if the entry was made either in person or by one authorized to make it,* and hence that any agreement to sell the scrip prior to the loca-

tion of the land could not affect the right to have the scrip entered and the land taken by or in the name of the scripee. We consider this case on the whole as strongly supporting the decision of the trial judge, and the decision in the case at bar in the Supreme Court of Minnesota is in line with this case and with every case in that court touching any of these questions.

Dole vs. Wilson, 20 Minn., 356, (Gil. 308), is cited as having a bearing upon the construction placed upon the act in question.

This case involved, as stated by counsel, Chippewa scrip. The court held that the scrip was not assignable but that the person named in the scrip could make a valid contract to convey the land on which it might be located and that such contract would not be affected by the fact that there was an attempt to transfer the scrip. The agreement entered into between the plaintiff and the defendant in the case of Dole vs. Wilson, was in writing and specifically contracted to sell 28 pieces of Chippewa land scrip of 80 acres each at a stipulated price; and the complaint set out that the 28 half-breeds to whom the scrip was issued had, for a valuable consideration, paid by the plaintiff, agreed to convey by good and sufficient deeds with covenants of warranty and seisin all such lands as might be selected and entered by them, either in person or by attorney to such party as should locate such certificates or scrip, his heirs and assigns on demand after the location thereof, and that these agreements of the half-breed were conveyed and delivered as an inci-

dent thereto to the defendant and that the pieces of scrip were located on the public lands and that the lands had been patented to the half-breeds and that the half-breeds had conveyed. The action was to recover the price agreed to be paid to the plaintiff and while the court held that if the defendant's promise to pay was founded solely upon the attempted sale of the certificates as a consideration, the promise would be nudum pactum, it held that the complaint showed that the scrip was accompanied by an agreement to convey, delivered in connection with the scrip and as incident thereto, and was part of the consideration of the defendant's promise and that the same supported a good consideration. The court said on page 312 of the Gilfillan edition:

> "Inasmuch as the scrip was unassignable and the title to the same could not be transferred, we see no reason why it was not entirely competent for the half-breeds to revoke their delivery and to assert their right to the scrip and to the possession thereof regardless of the delivery. But, notwithstanding they had this right, it was also competent for them at their option to suffer the defendant to retain the actual possession of the scrip as they appear to have done ******** As to the agreements to convey, they are certainly per se unobjectionable. The treaty not only contains no prohibition of such conveyance but it expressly provides that the lands are to be secured to the half-breeds 'by patent in the usual form.' "

This then is authority to the effect that any agreement to convey the scrip could not defeat the

entry or the right of the Indian to have the lands and also to the effect that a contract, even before location, to convey the land would not defeat the location.

There were a great many provisions in the Chippewa treaty of a limiting and restricting character not found at all in the Act of 1854 to which we shall refer in another connection.

The lands were to be selected by the terms of this grant under the direction of the president. The president directed the land department to provide a means for carrying into effect the grant and the land department devised a form of unassignable scrip, under which the land had to be taken by or in the name of the scripee. The language of the court respecting alienation is therefore significant. Clearly any restriction of a personal character did not in that case nor in Sioux half-breed scrip extend beyond the location of the land and the patenting of the same in the name of the scripee.

Notwithstanding the comments of counsel as to Eaton's entry of the land for Stram, we again assert that the government, having contracted to give these lands for a return of the scrip, the land being subject to location thereunder and no adverse rights attaching, upon the reasoning of these cases the Secretary of the Interior had no right under the guise of a supervisory power to set aside or cancel or annul the location of the scrip upon the land. The government had no interest in not having the scrip located upon the land. All

other questions concerning it were purely questions between the parties in which the government had no interest.

Felix vs. Patrick, 145 U. S. 317, has been cited by counsel, and it is claimed by him to be decisive of all of the points in the case at bar.

The location under the scrip involved in the case of Felix vs. Patrick was the same location which was sustained by the land department in the case of Felix vs. Carroll. This case is reported in 36 Fed. Rep., 457, and again reported on appeal in the 145 U. S. 317, Book 36, Lawyers Ed., 719. It was not decided either in the court below or in the appellate court on any other proposition than that of laches. The validity of the location as the location of Sophia Felix was not questioned and while Mr. Justice Brown in the opinion said that the parties by the use of a power of attorney and blank quit claim deed had attempted to avoid the prohibition against the assignment of the scrip, he also said that the moment the scrip was located the land became Sophia Felix' and subject to her disposition. The case went to the courts on a demurrer to the bill. The land was within the limits of the City of Omaha. It appeared as an admitted fact that the scrip for 120 acres with a blank power of attorney and the deed executed in blank had been obtained from Sophia Felix, the scripee, by fraud and that Patrick had obtained possession of the scrip and these blank instruments from some unknown person. Prior to that time he had been in possession of the premises seeking to acquire the same by

pre-emption, but the land being within the corporate limits of Omaha, he had been unsuccessful. After obtaining the scrip he entered the land and a patent was issued in the name of Sophia Felix. The blanks were filled up and the blank deed filled out and the land conveyed. It was alleged, and stood admitted, that Patrick knew of all of these transactions and that he did not pretend that he was acting as the agent of Sophia Felix. Certain acts of congress had been passed in the attempt to confirm the title to the land. The decision was rendered in 1888. Sophia Felix had been dead since 1865. Her father and mother had been dead for years. Her brothers and sisters as the surviving heirs were the plaintiffs. The two principal points urged in support of the demurrer were the effect of the confirmatory acts of congress and the staleness of the claim. The court declined to pass upon the question whether the patent had been improperly issued and rested its decision solely on the question of the staleness of the claim, after the land involved, by the growth of the city, had become enhanced in value without any acts, whatever on the part of the plaintiffs. The court said that Patrick never intended to act or pretended to act as the agent of Sophia Felix and it was not even alleged that she parted with the scrip to an agent but that it was obtained from her by fraud and the court declined to consider the matter as a case for the application of the doctrine of constructive trusts and passed on to determine the case on the question of laches and the staleness of the claim and Mr.

Justice Brewer in the case as reported in the 36 Federal used the language with reference to the intelligence and capacity of the half-breeds that we have cited in another part of this brief.

The court will notice that the Supreme Court in affirming the decision of the lower court decided the case upon the same question of laches. The facts which stood admitted showed that Felix had never even parted with the title to the scrip or tried to do so, and was the owner thereof and that the papers were all obtained from her by fraud, and that Patrick had procured the scrip with the intent to appropriate it to his own use and to defraud Sophia Felix out of the same and of all benefits thereunder. The quit claim deed entirely blank both as to land and as to parties, obtained from her, under which Patrick claimed, was obtained before there was any land entered or located and admittedly was obtained by fraud. It does not seem to us at all surprising that the courts below declined to coincide in the view of the plaintiff's counsel that this case is decisive of the case at bar. The facts of the case are not the same by any means as in the case at bar, and the issues involved were very different. We are quite sure the learned Justice who wrote the opinion will be surprised that it is claimed the questions decided in that case determine the issues in this. In fact it furnishes no support to the plaintiff's contentions and we say again as before that this court is practically without any authority cited to it in support

of the plaintiff's contentions, save and except the Secretary's decisions.

Smith vs. Stevens, 77 U. S., 321, was quoted from at some length by counsel for plaintiff in error to show that the treaty of 1825 in question in the decision, contained numerous prohibitions and restrictions and provided specific ways in which the lands covered by the treaty could be conveyed. Neither the case nor the treaty have any kind of application to the case at bar and we suppose that counsel cited the case to show that in cases where the government thought it was necessary to do so, it put safeguards and restrictions about the alienation of lands granted to Indians.

The plaintiff's counsel cited a number of cases to the Minnesota court stated to be upon the subordinate propositions involved in the discussion of this case.

Under that head he made a quotation from Lytle vs. State of Arkansas, 9 How., 314, the quotation being made from page 333, simply stating that it is the policy of the government to allow the adventurous pioneer who has settled upon unsurveyed land to take 160 acres under the pre-emption law. This case was under the pre-emption law of 1830. Of course neither the decision nor the quotation has any kind of relevancy to matters involved in the case at bar, but while counsel was quoting therefrom he might have quoted from the same page 333 the following very well declared doctrine:

"It is a well established principle that where an individual in the prosecution of a right does everything which the law requires him to do and he fails to obtain his right by the misconduct or neglect of a public officer, the law will protect him. In this case the pre-emptive right of Cloyes having been proved, and an offer made to pay the money for the land claimed by him, under the act of 1830, nothing more could be done by him, and nothing more could be required of him under that act."

This suggests that when the scrip in this case had been tendered by the half-breed in payment for the land selected and there were no intervening adverse rights that she had done all she was required to do in order to obtain this land.

Buxton vs. Traver, 130 U. S., 232, Atherton vs. Fowler, 96 U. S., 513, and Johnson vs. Towsley, 13 Wall., 72, quoted by counsel in his brief below do not require any attention.

Atherton vs. Fowler decided that no right of pre-emption can be established by a settlement and improvement on public lands where the claimant has obtained possession by breaking into the enclosure of another who has already settled upon, improved and enclosed the same land and that such an intrusion although made under the pretence of pre-empting the land is but a naked, unlawful trespass. We should hardly wish to concede that we had to combat that proposition in order to sustain the issues of this case. We suppose counsel made the long quotation from that case because the court

used the expression that the policy of the government had been gradually changed until in 1862 pre-emptions were allowed on both unsurveyed and surveyed lands; but long prior to 1862 pre-emptions were allowed on unsurveyed lands, as we have seen.

Webster vs. Luther, 50 Minn., 77, was quoted from as showing what was the intent of the government in the homestead act, namely; to secure settlement, peopling and cultivation of the lands.

Anderson vs. Carkins, 135 U. S., 483 was also quoted from at length relative to the restrictions against the alienation of homesteads and that the homestead was intended for the exclusive benefit of the homesteader. Of course the homestead law required settlement and residence and contained provisions against alienation, but what was the policy of the government in the enactment of the homestead and pre-emption laws and the policy of the government in the Act of 1854 are quite different things.

Monette vs. Cratt, 7 Minn., (Gil.,) 176, has already been quoted from by us near the beginning of our second chapter. We again call the court's attention to Judge Atwater's language on page 184, where he said:

> "The main object of the Act of July 17th, 1854, appears to have been to get rid of the Indian or half-breed title to the reservation on the west side of Lake Pepin and to bring the same into market."

The cases of Myers vs. Croft, 13 Wall., 291, and Quinby vs. Conlan, 104 U. S., 420, were also cited. These cases held that the restriction upon the right of pre-emption did not extend to a restriction upon the alienation of the land after the entry was made. We know of no benefit which the plaintiff in this case can extract from these cases. As to such cases as Meyers vs. Croft, Camp vs. Smith and other cases which we have cited upon another page of this brief, we make the contention that upon principle they support the claims of the defendants in this case to the land in question and that they cannot be distinguished in their application of the law from the principles and policy which we invoke in this case. The personal limitations were only given effect as related to the right to enter before entry was made.

Some other cases quoted from by counsel do not seem to require any discussion from the defendants in error.

The case of Fee vs. Brown, was greatly relied upon by counsel in the trial court but little was said about it in his brief in the Supreme Court of Minnesota which perhaps was an act of prudence. The case is found in 162 U. S. 602, Law. Ed., Book 40, page 1086.

It arose under the Chippewa Indian act. The proclamation by the President of the treaty with the Chippewas was dated September 30th, 1854. The act was passed December 19th, 1854. (See 10 Stat. at Large, 598), being passed subsequent to the proclamation of the treaty. The act was radically

different from the Act of July 17th, 1854. The restrictions upon alienation were very different. Among other things it was provided that the patents should expressly declare that the lands should not be alienated or leased until otherwise ordered by congress. The purpose of the act was to locate within certain territory those bands of Indians upon tracts of land in severalty and endeavor to inculcate in them a spirit of homebuilding and following agricultural pursuits, and to prevent not only the alienation of the right to take the land but to prevent the alienation of the land until congress should thereafter become satisfied that they had become sufficiently progressed in the arts of civilization to have the restrictions removed, the act clearly contemplating the residence of the Indians upon the parcels awarded to them. Yet the scrip was dealt in as such and a large amount of lands located thereunder in sections of the public domain far outside the ceded territory, in many cases by persons who had no intent to do wrongful act. An inquiry was made into the subject and acts were passed permitting such persons to purchase the land at less than the government price, this being done in the interest of what the government thought to be a fair and equitable adjustment of the difficulties which had arisen.

The lands in question in the case of Fee vs. Brown were located in the State of Colorado, and one of the questions at issue in the case was whether the location of the scrip could be made in any

event outside of the ceded territory, and another question was whether the Act of 1872 referred to authorizing the purchase of lands located with claims arising under the seventh clause of the second article of the treaty, could be held to apply to lands so located outside of the ceded territory; and all that the case decides is that the treaty should be considered with the act of December 19th, 1854, and that the location was intended by the government to be within the ceded territory, and that the Act of 1872 being intended to give relief to persons who had located lands by mistake and misapprehension of the law, it should not be given so narrow a construction as to be confined within the said territory. As the learned Justice who wrote the opinion said, the case turned on the Act of June 28th, 1872. No question in this case was there involved.

We have never been able to see what benefit counsel could extract from the case. Yet he referred to it in his brief in the Supreme Court of Minnesota and has, at times, strongly asserted it as an authority in some way for the plaintiff in error.

The case of Monette vs. Cratt, 7 Minn., 234 (Gil. 176), has been referred to by the plaintiff but aside from what the court may have said relative to the supervisory jurisdiction of the officers of the land department there cannot be found in it anything to sustain the claims of the plaintiff or the construction which it asks the court to put upon the law. The case was before the court on de-

murrer. Two half-breeds had located scrip upon the same tract within the reservation. The decision had been in favor of one of them. It had been carried to the Department and the Secretary of the Interior disallowed the Cratt location and allowed the location of Monette and patent issued to her. The complaint does not appear to have set forth any grounds of error in the decision of the Secretary, but it was claimed that he had no right or power to decide the question; that after the question had been determined by the local land officers that the courts only had jurisdiction. We find nothing in the decision even suggesting anything contrary to the construction of the law of 1854, which we have contended for.

On page 113 of his brief in the Minnesota court, the counsel quoted from the case of Webster vs. Luther, to show that the court will not be bound by a practice and construction placed upon the law by the executive department and will not permit such construction or practice to defeat the obvious purpose of the statute. This seems to be a strange citation for the plaintiff to have made after having relied so strenuously upon certain departmental decisions which clearly rested upon something outside of the statute for foundation. What *we* claim is that the departmental decisions cannot incorporate anything into this law or add anything to it upon which to rest their course of practice or upon which to determine the rights of these parties. It was upon just such an unwarranted regulation

that the Secretary undertook to deprive defendants or their predecessor, of the land in question.

We have thus spent much time in reviewing these cases, but we have done so because we are confident that an inspection of the cases will show the court that they are not only wanting in sustaining the claims of the plaintiff in error, but, on the contrary, that so far as they contain matter applicable to the issues of this cause, they are on principle in favor of the defendants; and that in these very cases many of the questions surrounding the issues in the case at bar are determined favorably to the contentions of the defendants and that the decision of the learned trial court and his reasons therefor as expressed in his admirable memorandum, and the decision of the Supreme Court of Minnesota, are in accord with the determination of these principles in these cases and other cases cited by us and only at variance with the decisions of the Secretary of the Interior commencing with the case of Allen vs. Merrill; that the Secretary cannot, as oft declared by the courts, under the cloak of supervisory power, cancel or annul the entry of the claimant arbitrarily or in contravention of her rights; and unless his decision was founded on a correct construction of the law and was in accord with the facts as shown upon the record, it cannot operate to deprive the defendants in error of their remedy in court.

For the errors complained of in our answers, established on the trial and set forth in the first chapter hereof, and so determine by the trial court

and by the court of last resort of our state, the decision of the Secretary was erroneous and was subversive of the vested rights of the defendants and of their predecessor, the scripee.

The judgment of the Supreme Court of Minnesota should be sustained.

In the various cases arising among parties who were attempting to get these lands, or some part thereof, to which cases these defendants were not parties, some of which cases have been referred to, the court will notice such names as Hyde, Hartmann, Germania Iron Co., and others. In these cases can be seen the index finger pointing toward the plaintiff in error the so-called "Midway Company," which, through various of its minions, has tried to extend its grasp to these lands. The trial Court, who had a good opportunity to get a correct measure of the parties, used apt language when in the closing paragraph of his memorandum he said: "Plaintiff in this case is simply trying to take from the defendants property acquired in good faith under a locaton made as thousands of others were."

It is undoubtedly the fact that years ago substantially all of the Sioux half-breed scrip was located, and located in the manner this was.

Shall perfidy and greed be rewarded by depriving the rightful owners of that which was acquired in good faith, in violation of no law and in accord with the accepted and settled practice and multitudes of titles be unsettled, or shall they not? Our courts have said in no uncertain way *it shall*

not be done, and we have unlimited faith that their judgments will be sustained in this the last tribunal which can deal with these questions.

Duluth, August, 1901.

Respectfully,

JED L. WASHBURN,

Attorney for Defendants in Error, Merril M. Clark, Richard H. Fagan and Leonidas Merritt.

WILLIAM D. BAILEY,
Of Counsel.

P. S.—Wherever italics appear in this brief they are our own.

No. 80.

1372

OFFICE SUPREME COURT
RECEIVED
FEB 7 1902

Supreme Court of the United States.

Petition for Rehearing.

NO. 80 OCTOBER TERM, 1901

THE MIDWAY COMPANY,
Plaintiff in Error,

AGAINST

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN and MARGARETHA LONSDORF.

Rec'd Feb. 7, 1902.

SUPREME COURT OF THE UNITED STATES.

No. 81 OCTOBER TERM, 1901.

THE MIDWAY COMPANY,
Plaintiff in Error,

AGAINST

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN and MARGARETHA LONSDORF.

The plaintiff in error in these actions respectfully petitions for a re-hearing, and upon a single point, and considerations incidental to it.

Preliminary.

The cases present the question of the credit which belongs to the action of the Department of the Interior of the Government of the United States.

effect that the scheme of a blank power of attorney is a palpable device to evade the Act of 1854, and particularly in view of the fact, to use Justice BROWN's language, "that the grantors were Indians" (Opinion of Mr. Justice BROWN, p. 326).

Vide, also, opinion of Mr. Justice BROWN in *Fee vs. Brown 162 U. S., 602.*

The duty to give the Indians or half-breeds the protection which is due to them from the Government rests with its Department of the Interior. It was properly exercised in this case, and the plaintiff in error could safely rely upon it for its protection.

If it be claimed that the execution by Eaton in his own favor of the so-called powers of attorney needed to be disaffirmed, it devolved upon the Department of the Interior to discharge this duty in the interest and for the protection of the half-breed. It did so. If the protection was due to the Government the Department acting for the Government has refused to affirm it.

The petition of the plaintiff in error is for a rehearing upon the foregoing point. An examination of the opinion of Mr. Justice MCKENNA will show that it was not dealt with by him.

The plaintiff in error had the right to rely, if the Act of July 17th, 1854, was ambiguous, upon the settled construction given to it from the time of its passage to the present date by the Land Department of the United States, as to which construction the Supreme Court of Minnesota, in *Gilbert vs. Thompson*, declared: "That it was the intention of Congress that the right to acquire "public lands by means of this script should be a personal right "in the one to whom the same issued," and in *Merick vs. Thompson* declared that the act required that the location should be made for the benefit of the half-breed principal, and not for that of the attorney with which construction the Supreme Court of the United States in *Felix vs. Patrick* (145 U. S.) agreed. These decisions, as well as the construction placed upon the act by the Land Department, taken in connection with the decisions of this Court as to the effect to be given to the long-continued construction of a statute and the right of the public to rely thereon, constituted assurances to the plaintiff in error and the public generally of the perfect safety with which he could rely upon the action of the Land Department in cancelling the locations in question, and could purchase and expend money upon the premises involved in the controversy.

Mr. Justice McKENNA, in his opinion, says that this is a "close case." It is respectfully and urgently submitted that it is a case which pre-eminently calls for a further hearing.

January 31st, 1901.

THE MIDWAY COMPANY,
By A. M. MILLER,
President.

{ Corporate Seal }

We hereby certify that we have carefully examined the decision of the Court in these cases, that we are familiar with the cases, and that, in our opinion, there should be a rehearing, and that this motion is not made for purposes of delay.

Dated January 31st, 1902.

JNO. E. PARSONS,
JOHN G. JOHNSON,
Of Counsel for Petitioner.

No. 80 and 81.

1514

SUPREME COURT
RECEIVED
FEB 7 1902

Mem. on Pet'n for Rehearing.

Supreme Court of the United States.

81

NO. 80, OCTOBER TERM, 1901.

~~Received Feb. 7,~~ 1902.

THE MIDWAY COMPANY,
Plaintiff in Error,

AGAINST

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN and MARGARETHA LONSDORF.

Memorandum in Support of Motion for Rehearing.

The decision in effect holds: 1, that an agent may act for his own benefit concerning the subject matter of the agency; and, 2, that such action is binding upon his principal.

The Court by its decision has sustained the transfer of the scrip for the lands in controversy by Eaton, under power of attorney, although the transfer was to himself.

In so far as the decision of the Court sustains the right of a half-breed to be divested of his scrip by power of attorney it proceeds upon the assumption that the attorney acts as attorney, and that the transfer by attorney is to a stranger.

Here the power of attorney was executed by Eaton in his own interest.

It is universally recognized that this may not be done.

Robertson vs. Chapman, 152 U. S., 673.
Wardwell vs. R. R. Co., 103 U. S., 651.
Williams vs. Company, 43 Minn., 537.
Smitz vs. Leopold, 51 Minn., 455.
Dutton vs. Willner, 52 N. Y., 312.
Murray vs. Beard, 102 N. Y., 505.

However effectual, in cases where there is an actual transfer to a third person, may be the device of a double power of attoeney, it is directly against both the spirit and language of the protection afforded by the Act of 1854, when the transfer by the attorney is to the attorney, even if this were part of the arrangement with the half-breed.

Upon the subject of the use of a double power of attorney executed in blank, both as to the name of the attorney and the description of the land accompanying the scrip, this Court has said in Felix vs. Patrick, 145 U. S., 317, that it was a palpable device to evade the provisions of the law against the transfer of the scrip.

In Fee vs. Brown, 162 U. S., 602, this Court says, with reference to the use of a double power of attorney, as in the case at bar (p. 607):

> "Notwithstanding this provision, which was intended to secure to the holder of the certificate the land itself, they were made the subject of purchase and sale through the device of powers of attorney, signed by the person to whom the scrip was issued, authorizing some person, whose name was left in blank, to locate the scrip upon lands to be selected by him, and to sell and convey the lands so selected. On the patent being issued to the person named in the certificate, the name of the attorney was filled in, and the deed executed by such person as the attorney in fact of the person named in the certificate to the actual purchaser. *Of course, this scheme was in the nature of a fraud* upon the act."

If it be granted that this device may succeed where the power of attorney is executed in the ordinary way—that is to say, so as to accomplish a transfer from the principal through attorney to a stranger, it is respectively submitted that the case is essentially different where the attorney and the transferee are the same. That was this case.

There could be no more effectual scheme by which to defeat the Act of 1854, whether it be assumed that it was intended for the protection of the half-breed or for the protection of the Government.

Such devices in whatsoever form, for the purpose of evading a statute, have been characterized by this Court as fraudulent, the test being not the form of the transaction, but whether there is an intent to evade the law, and that intent is accompanied by the means for its accomplishment. Thus in the case of the Trinidad

Coal and Coking Co., 137 U. S., page 170, this Court says, at page 167:

> "It was for Congress to prescribe the conditions under which individuals and associations of individuals might acquire these lands, and its intention should not be defeated by a narrow construction of the statute." * * * (Page 166:) "It is contended that the case made by the bill is not within the prohibitions of the statute, although the demurrer admits that the Trinidad Coal & Coking Co. acquired the lands in dispute pursuant to a scheme whereby the several tracts were to be entered for their benefit in the name of certain persons—its officers, stockholders and employees—the title when thus obtained to be conveyed to the company, which should and did bear all expenses attending the entries and purchase from the Government. This contention cannot be sustained unless thecourt lends its aid to make successful a mere device to evade this statute.
>
> * * * * * *
>
> There is consequently, in view of all the allegations of the bill, no escape from the conclusion that the lands in question were fraudulently obtained from the United States. We say fraudulently obtained because if the facts admitted by the demurrer had been set out in the papers filed in the land office the patents sought to be canceled could not have been issued without violating the statute. The defendant would not have been permitted to do indirectly that which it could not do directly.
>
> * * * * * *
>
> It is the case of an association seeking to evade an Act of Congress by using for its own benefit the names of both its members and employees to obtain from the Government vacant coal lands which it could not legally obtain upon entries made in its own name."

The effect of the opinion in the case at bar is to overthrow the principle of this decision by treating as immaterial evidence to show the real intent and effect of the transaction taken as a whole.

2. In this connection attention is called to a misapprehension as to the facts in the cases of Myrick vs. Thompson, and Gilbert vs. Thompson, appearing upon the face of the opinion, which must have misled the Court. In the opinion at page 10 (bottom) the Court says:

> "If evidence was excluded in Gilbert vs. Thompson, it was admitted and considered in Thompson vs. Myrick, and

in both cases the delivery of the scrip and its location under letters of attorney were decided to be valid, forming in one case a good title, and in the other constituting a ground *for a compulsory conveyance from a half-breed.*"

And at page 12 (bottom) it is said :

> " It was decided in Thompson vs. Myrick, *supra*, that a valid location could be made by an attorney in fact of the Indian, and that he could, 'either before or after the location was made,' *enter into an agreement to* secure or convey the title. That case was affirmed by this Court, and the facts of the case at bar bring it within the ruling."

But in Myrick vs. Thompson *there was but a single* power of attorney, that to *locate* the scrip, accompanied by *no* power to convey or agreement from the half-breed. No decree for specific performance was made against the half-breed, nor was any contract either made by her or upon her behalf. Upon the evidence admitted the Court asserted the true meaning of the statute, and said that there was nothing to show its evasion. If there was an intent to transfer the scrip the intent was effectual because not accompanied by the means for its accomplishment.

In Gilbert vs. Thompson there was but a single power—that to convey the land—which was executed, not in favor of the attorney as in case at bar, but in favor of an innocent third person, and at the time of the suit patent had issued, the land had passed through the hands of three or four innocent parties who were in possession, and the title of the half-breed *had been perfected* by the issue of patent, and neither she nor the Government were parties to the action, but the Court said that " *It was the intention of Congress that the right to acquire public land by means of the scrip should be a personal right in the one to whom a scrip issued.*"

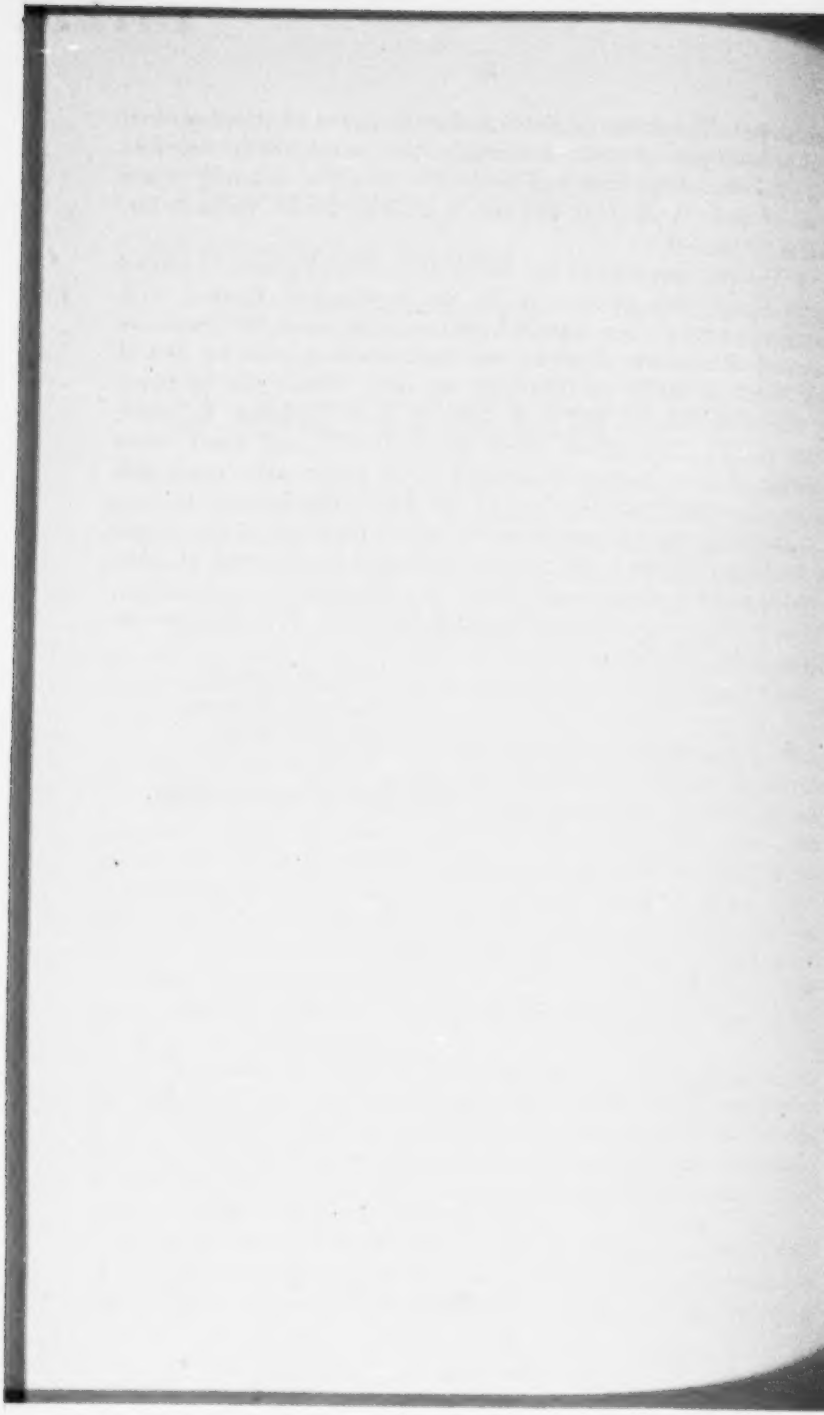
3. The protection afforded by the Act of 1854 is due either to the half-breed or to the Government. If it is to the Government, then it is manifest that the Government never acquiesced in the evasion of the law that was attempted by Eaton and his associates, but, on the contrary, through the action of the Department of the Interior, disaffirmed and annulled it.

If the protection intended by the Act of 1854 was for the benefit of the half-breed, then again the action of Eaton and his associates was in direct violation of its terms. The attempted device was a

mere sham. The action of Eaton under the power of attorney could only be sustained upon the assumption that what really occurred was a transfer of the scrip and that the power of attorney was a device to make it effectual, and this is what in direct terms is forbidden by the act.

4. The true meaning of the Act of 1854, if ambiguous, is settled by the construction given to it by the department charged with its execution for so long a period, by the decisions of the Supreme Court of Minnesota asserting its true meaning, and by that of this Court in Felix vs. Patrick; so that within the principle of Hewitt vs. Schultz, 180 U. S., 139; U. S. vs. Alabama Railroad, 142 U. S., 621; Hawley vs. Diller, 178 U. S., 476, and many other decisions of this Court, the plaintiff could safely rely upon this construction, and upon the duty of the Land Department to execute the law in accordance therewith, as the guardian of the people of the United States in all matters relating to the disposal of public lands and the enforcement of the law (Knight vs. Association, 142 U. S., 161; Orchard vs. Alexander, 157 U. S., 372; Hawley vs. Diller, 178 U. S., 476).

JNO. E. PARSONS,
JOHN G. JOHNSON,
WALTER AYERS,
P. H. SEYMOUR,
Of Counsel for Petitioner.



Supreme Court of the United States.

No. 80.—October Term, 1901.

The Midway Company, Plaintiff in Error, vs. Frank W. Eaton, Leonidas Merritt, Merrill M. Clark, Richard H. Fagan and Margaretha Lonstorf.	In error to the Supreme Court of the State of Minnesota.

[January 13, 1902.]

This is an action to quiet title, and was brought in the district court in the eleventh judicial district, county of St. Louis, State of Minnesota.

The plaintiff in error claims title under a United States patent issued to its grantor, one Frank Hicks, upon a homestead settlement. The defendants in error claim under locations of what is commonly known as "Sioux half-breed scrip," issued under the act of July 17, 1854. (10 Stat. 304.) These locations, it is alleged, were prior in time and right to the claim of Hicks, and therefore the patent was illegally issued to Hicks. It was prayed that the title represented by the patent be adjudged to be held in trust for the defendants in error, and that the plaintiff in error be required to convey such title to them in proportion to their interests set forth in their cross bill.

The controversy turns upon the validity, of the scrip locations. Their validity was adjudged by the district court, and by the Supreme Court of the State. (79 Minn. 442.) This writ of error was then sued out.

The facts as found by the court are: That under the act of July 17, 1854, and in pursuance of said act, there were issued to Orillie Moreau certificates commonly known as Sioux half-breed scrip numbered, 19E and 19D, which entitled her to select and take one hundred and sixty acres of the public lands of the United States of the classes mentioned in said act; "that thereafter, and on the 16th day of June, A. D. 1883, the said Orillie Moreau, then Orillie Stram, never having theretofore made use of the said certificates of scrip, and the same never having been in any manner extinguished or satisfied, through the defendant Frank W. Eaton, who had theretofore been by her duly empowered as her attorney in fact for that purpose, presented said scrip at the local land office in Duluth, Minnesota, and then and there made application to locate the same on certain then unsurveyed lands of the United States in said district in which said land office was located, and did then and there enter and file upon by virtue of said scrip the lands for which said application was made as afore-

said, and filed therewith a diagram or plat of said land embracing a sufficient description thereof to properly designate the same, which lands were in said application described by metes and bounds;" and that the same were "lands not reserved by the government of the United States for any purpose whatsoever;" and also that "prior to the location of said scrip upon said land as above found improvements had been made thereon, consisting of a house 14 by 16 feet, by and under the authority of the said Frank W. Eaton."

On the 20th of July, 1885, the lands having been duly surveyed, a plat and survey of the township in which the lands were situated were "duly filed in the local land office at the city of Duluth, Minnesota, and thereupon and on the 21st day of July, 1885, upon application of the said Orillie Stram, acting by and through her said attorney in fact, said certificate of Sioux half-breed scrip number 19D was adjusted to and upon the lands in controversy," (they were specifically described,) and the scrip was then and there duly located upon said lands as surveyed lands, and the locations were allowed by the officers of the local land office at Duluth, there not being at that time nor at the time the scrip was located upon the lands when unsurveyed, nor at any other time, any valid adverse claim to said lands; and on the 21st of July, 1885, receiver's final receipts and certificates of entry were duly and regularly issued to said Orillie Stram, and duly and regularly recorded in the counties of Lake and St. Louis, Minnesota, within a few days thereafter.

The "rights and interests" of Orillie Stram, by sundry mesne conveyances, were conveyed to the defendants in the proportions respectively as follows: "Frank W. Eaton, the undivided 13–36; Merrill M. Clark, the undivided 9–36; Margaretha Lonstorf, the undivided 8–36, and Richard H. Fagan, the undivided 6–36, and the said defendants are still the owners of the said lands in said proportions."

That on the 20th of July, 1885, one Thomas Hyde and one Angus McDonald respectively made application to make pre-emption filings on portions of the lands in controversy, which applications were denied both on the ground of the prior locations of the scrip and that the applications were not made in good faith, but in fraud, and in violation of the pre-emption laws. And it was determined by the local land office and sustained by the Commissioner of the General Land Office, and by the Secretary of the Interior, that neither Hyde nor McDonald ever had or obtained any rights whatsoever by reason of their application or any subsequent proceedings, but, notwithstanding, said Hyde and said McDonald "made an attack upon the said decisions of the Land Department some time in November, 1885, and upon the location of the said certificates of scrip and the entry of lands thereunder." A hearing was had on the 6th of April, 1886, and the local land officers sustained the scrip locations. An appeal

was taken to the Commissioner of the General Land Office, and he held "adversely to the scrip locations." An appeal was then taken to the Secretary of the Interior. A hearing was had before the Secretary, February 18, 1889, and he held and determined that neither Hyde nor McDonald had any interest or valid claim to the lands, but, notwithstanding, also held that the scrip locations were illegal and invalid, and that neither Orillie Stram nor those claiming under her were entitled to the lands for the following reasons: (1) that the improvements made upon the land when it was unsurveyed were not made under the personal supervision of Orillie Stram, and that she had not had personal contact with the land; (2) that the power of attorney to Eaton to locate the scrip, and the power of attorney executed at the same time to Leonidas Merritt to sell the lands which should be located, operated as an assignment of the scrip, and were in violation of the act of July 17, 1854, and the entry of the lands therefore was not for the benefit of said Orillie Stram; (3) that the subsequent location and adjustment of the scrip to the lands after the latter were surveyed were ineffectual in view of the previous attempt to locate the scrip, and in view of his (the Secretary's) decision relative to the question of improvements; (4) that Orillie Stram had no power to alienate the lands before location of the scrip or to contract for the sale of them, or to grant a power of attorney to sell the same for her after they should be located, but held that she had the right to sell immediately after location of the scrip. As a deduction from these conclusions, the Secretary held that the lands were still public lands and open to entry. The decision of the Secretary was attached to the findings as an exhibit.

That on the 31st day of March, 1886, and prior to the hearing had before the local land office at Duluth, the said Orillie Stram and her husband Roman Stram made and executed a deed for seven-ninths of the land in controversy to Frank W. Eaton, with warranty of title, The deed was subsequently recorded in St. Louis and Lake Counties.

The deed recited the location of the scrip in the land office at Duluth, June 16, 1883, by Eaton, as the constituted and appointed attorney in fact of the Strams, and that the title thereby vested in Orillie Stram. It also recited the survey of the lands and the adjustment of the scrip and entry to such lands, and "thereby the aforesaid scrip and entry were adjusted July 21, A. D. 1885, thereby specifically and perfectly describing the land filed upon for me, the said Orillie Stram, by the said Frank W. Eaton, and intended to be entered on June 15, A. D. 1883, in the name of the said Orillie Stram, by our attorney in fact, the said Frank W. Eaton." It also recited the power of attorney given to Leonidas Merritt, acknowledged it, and ratified and confirmed the conveyance by him to Eaton.

It was further found that in pursuance of the decision of the Secretary of the Interior the lands were attempted to be thrown open to public entry,

and a patent was subsequently issued to Frank Hicks, and that Frank Hicks and his wife conveyed the same to The Midway Company, the plaintiff in error, "who now holds whatever title thereto enured to the said Frank Hicks." That neither Orillie Stram nor her husband, nor any of the defendants, "were in any manner parties to the proceedings to the decision of the Secretary of the Interior rendered on the 18th of February, 1889, and that said Hicks had at all times full knowledge of all rights and claims of the defendants." That the findings of fact of the Secretary of the Interior were fully sustained by the evidence in the cause presented to him, "except that it is found as a fact by this court, that the improvements caused to be erected by Frank W. Eaton upon the said premises consisted of a house about 14 by 16 feet in size; and it is further found as a fact that from the evidence before the Secretary of the Interior in said cause, presented to him by the record upon said appeal, it did not appear that the scrip referred to in the decision of said Secretary had passed through many hands or through any hands before coming into the hands of the said Frank W. Eaton, nor did it appear that the powers of attorney to locate said scrip and to convey the land located therewith had been executed by the said Orillie Stram years before the location thereof by the said Frank W. Eaton, but that on the contrary it appeared from the evidence before the Secretary that said powers of attorney were executed by the said Orillie Stram about one week before the location of the said scrip by the said Frank W. Eaton, and that the said powers did not contain the names of the grantees. It is further found as a fact that it did not appear from the evidence before the said Secretary that the said Orillie Stram never saw the said lands; it did not appear from the evidence before the said Secretary that she had sold the said scrip long prior to the location thereof; it did not appear from the evidence before the said Secretary that for a long time she directly and positively repudiated Eaton and Merritt as her attorneys in fact, denying that they acted for her in any capacity whatsoever."

Mr. Justice McKenna delivered the opinion of the Court.

The decision of the controversies in this case depends upon the validity or invalidity of the scrip locations, either originally when the land was unsurveyed, or subsequently when the location was adjusted to the land as surveyed.

The act of Congress of July 17, 1854, (10 Stat. 304,) authorized the issue of scrip to the half-breeds of the Sioux Nation of Indians in exchange for certain lands, which scrip might be located (1) upon any land within the Sioux half-breed reservation; or (2) "upon any other unoccupied lands subject to pre-emption or private sale;" or (3) "upon any other unsurveyed lands not reserved by the government, upon which they

(the half-breeds) have respectively made improvements. It is provided in said act, "That no transfer or conveyance of any of said certificates or scrip issued shall be valid."

On the latter provision of the act the plaintiff in error bases the contention that the scrip is not assignable, and that the power of location is strictly personal to the Indian, and must be made whether on surveyed or unsurveyed land, either by him or for his benefit, and that the improvements on unsurveyed land must be made under his personal supervision and direction; that he must come in personal contact with the land. And it is hence asserted that the powers of attorney given to Eaton and Merritt were virtual assignments of the scrip and frauds upon the act of Congress; that the improvements were made not by Orille Stram, the half-breed, or for her benefit, but by Eaton and for his benefit; and that the subsequent adjustment of the locations of the land after its survey was made for him, not for her; for his benefit, not for hers. On the other hand, the defendants in error contend that the prohibition against the assignment of the scrip is strictly of the scrip as such, not of the rights or powers conferred by it. That the provision of the statute is not a prohibition upon the alienation of the land; but is intended to protect the government against controversies about the transfer of the scrip, and to require and secure all of the steps and proceedings to be in the name of the Indian and the title to be issued in his name. It is claimed, therefore, that the requirements of the statute have been observed; that the locations were made in the name of the Indian, and for her benefit. And it is also claimed that if there was any defect in the location upon the land when unsurveyed, by reason of the insufficiency of the improvements or by whom erected, that defect was supplied by the location of the scrip after the land was surveyed, and the acceptance of the location of the scrip by the local land office, there being then no adverse rights to the land. And further, that the power of Eaton to make the location for the Indian was ratified by her (if it needed ratification), and all rights which enured to her were conveyed by her warranty deed to Eaton.

These contentions exhibit the controversy between the parties and present the only questions upon which we think it is necessary to pass, and the questions are certainly close ones. The Interior Department has not always given the same answer to them, and the latest decision of that department is opposed in the case at bar by the courts of Minnesota.

It is natural to respect the rulings of the Land Department upon any statute affecting the public domain, and if the rulings were contemporaneous with the enactment of the statute they afford a somewhat confident dent presumption of its meaning. One of the reasons is that the officers of the Land Department may have recommended the statute—indeed, may have written its words or, at any rate, were familiar with the circumstances

which induced the legislation. We have not, however, in the case at bar, an exactly contemporaneous construction of the act of 1854 by the Land Department. The first circular of instructions was not issued until March 21, 1857. It is, however, not without value, and it tends to the support of the contentions of the defendants in error. The circular stated that the scrip "must be located in the name of the party in whose favor the scrip is issued, and the location may be made by him or her in person, or by his or her guardian." And further: "You will observe that this scrip is *not assignable*, transfers of the same being held void; consequently, each certificate, as hereinbefore stated, can only be located in the name of the half-breed; and such certificate or scrip are not to be treated as money, but located acre for acre."

In the circular issued February 22, 1864, those instructions were repeated, and the following added: "When not located by the reservee in proper person, the application to locate must be accompanied by the affidavit of the agent that the reservee is living, and that the location is made for the sole use and benefit of said reservee." Prior to the issuance of the circular of February 22, 1864, to wit, in 1863, a contest came on appeal to the Land Department, between a location made by Sioux scrip which was issued to one Sophia Felix, and a claim under a pre-emption settlement. The Commissioner of the Land Department decided against the scrip location on two grounds, one of which was: "That 'the location of the scrip, although made in her name, was not made by her in person, nor by her guardian or duly authorized agent, for her use and benefit, but by an unauthorized person, and for the use and benefit of a person having no legal interest therein.'"

The decision was reversed by the Secretary of the Interior, who stated, through Otto, Assistant Secretary:

"As to your second objection, I remark that this kind of scrip is by the law declared to be not assignable. In this case Sophia Felix has signed the application to locate her own scrip. The signature must be treated by us as genuine, when there is no proof to the contrary; and when she has made no complaint against this use of her scrip. The fact that the scrip was carried to the land office and the business transacted by another person, does not affect the validity of her entry of the land.

"As the certificate of location issued in her name, and the patent will issue to her, neither the register's report nor the affidavits of third parties can be admitted to establish the interest of any other person in the location.

"We could not recognize such interest if an assignment in writing was produced and duly proven to have been executed by the half-breed—whether she could sell or did sell the land after the location of her scrip we need not inquire, and the validity and effect of any such sale or assignment must be left to the arbitrament of the courts of law. The location is valid on its face, and the owner of the scrip, so far as she is represented at all, demands the patent to issue in her name, and my decision is that she is entitled thereto."

In 1872 a special circular was issued (1 C. L. L. 723), which contained the following direction:

"That the application must be accompanied with the affidavit of the Indian, or other evidence that the land contains improvements made by or under the personal supervision or direction of said Indian, giving a detailed description of said improvements, and that they are for his personal use and benefit; in other words, you should be satisfied that the Indian has a direct connection with the land and is claiming the same for his personal use. Unless such evidence is filed, you will reject the application.

"In 1878 a new circular was issued which repeated the provisions of the circulars of 1864 and 1872, above quoted. (2 C. L. L. 1355; 5 C. L. O. 126.)"

Then came the decision of the Secretary of the Interior, Vilas, in *Allen et al.* v. *Merrill et al.*, (8 L. D. 207,) and in *Hyde and McDonald* and *Eaton and Stram.* They were affirmed on review by Secretary Noble. Those cases laid down the propositions upon which plaintiff in error relies in the case at bar. Between the decision in those cases and that in the Felix case there was an interval of thirty years, and pending that interval there were decisions of the courts which took the same view as Secretary Otto expressed in the Felix case.

In *Gilbert* v. *Thompson*, (14 Minn. 554,) a conflict of titles was presented based upon deeds from one Amelia Monette, a Sioux half-breed. The action was ejectment, and the deed, which plaintiff relied on, was executed by Amelia in person May 29, 1867; the deed upon which defendant depended was executed by her attorney in fact, Benjamin Lawrence, July 18, 1857, under a power of attorney dated May 27, 1857. The power of attorney authorized Lawrence to act for Amelia as follows:

"For me and in my name to enter into and take possession of all the real estate belonging to me, or of which I may hereafter become seized, situated in the county of Wabasha, in the Territory of Minnesota; and for me to lease, bargain, sell, grant and confirm the whole or any part thereof; . . . and for me and in my name to make, acknowledge and deliver unto the purchaser, or purchasers, good and sufficient conveyances."

Affirming the judgment which passed for defendant, the Supreme Court of the State said by Chief Justice Gilfillan:

"The act of Congress of 1854, under which Sioux half-breed scrip was issued, provides 'that no transfer or conveyance of any of said certificates or scrip shall be valid.'

"It was the intention of Congress that the right to acquire public lands by means of this scrip should be a personal right, in the one to whom the scrip issued, and not property in the sense of being assignable; but no restraint is imposed upon the right of property in the land after it is acquired by location of the scrip. In the scrip itself, the half-breed had nothing which he could transfer to another; but his title to the land, when perfected under it, was as absolute as though acquired in any other way. It follows, therefore, that any attempt to transfer the scrip, directly or indirectly,

would be of no effect as a transfer. The title to the scrip would remain in him, and the title to the land acquired by it would vest in him, just as though no such attempt had been made. Such attempt to transfer would not involve any moral turpitude nor the breach of any legal duty, as is the case with an attempt to transfer a pre-emptive right. It would be simply ineffectual, because the scrip is not transferable.

"A power of attorney, so far as it intended to operate as a transfer, would be of no avail; the right of the half-breed in the scrip and land would remain the same; it could not be made irrevocable, nor create any interest in the attorney. Should the attorney sell under it, he would be accountable to his principal, precisely as in the case of any power to sell; but a simple power to sell, executed by a half-breed, is good till revoked, and would extend to lands subsequently acquired by means of scrip, if such lands came within its terms. We think such a power could not be varied by parol proof that the parties had an intention not expressed in it, even to defeat the power, except on the same grounds as would admit such proof in other cases. The intent to transfer the scrip not being illegal, but only ineffectual, could not affect the power where not expressed in the same instrument, or in one equal in degree, as evidence. Whether the power to sell would be upheld in an instrument, upon its face a transfer, the former being only incidental, we do not decide."

Gilbert v. *Thompson* was affirmed and applied in *Thompson* v. *Myrick*, (20 Minn. 205.) The latter case came to this court, (99 U. S. 291,) and its doctrine was approved. The suit was for specific performance. Thompson, who was plaintiff in the court below, was in occupation of the land to which he was desirous of obtaining title. Myrick was "attorney in fact (duly constituted) of Francis Longie and Joseph Longie, his son, then a minor under the age of fourteen years, and of Francis Roi and Henry Roi, his son, then a minor under the age of fourteen years, and was duly authorized to locate certain half-breed scrip issued to said Joseph and Henry in accordance with the provisions of the act of Congress approved July 17, 1854."

With a view to the location of the scrip for the benefit of the beneficiaries, Myrick placed the same with powers of attorney in the hands of Thompson, and at the same time entered into a written agreement with Thompson, in which he agreed that upon the location of the scrip he would secure the title to the land located to be lawfully vested in Thompson. The consideration was $2,800, evidenced by a note payable in one year from its date, and to be secured upon the land as soon as Thompson should acquire title. Thompson located the scrip and demanded a conveyance of the title. Myrick refused, and conveyed the land to his wife, who was also a defendant in the suit. Specific performance was decreed by the trial court, and the decree was affirmed by the Supreme Court of the State. Among other defenses it was urged that the agreement between Myrick and Thompson was void as contravening the act of Congress of July 17, 1854. To the contention the Supreme Court of the State replied: "As to

the point that the real object of the contract was to accomplish a transfer of the scrip, we see nothing to distinguish this case in any important respect from *Gilbert* v. *Thompson*, (14 Minn. 544.)"

And further, in answer to the contention that the agreement was void on common law grounds by reason of the relations of Myrick to the grantees of the scrip, the court said: "As the scrip was made non-assignable by the act of Congress, (10 Stat. 304,) and therefore no valid transfer or conveyance of the same could be made, Myrick's relation to the scripees was that of an attorney in fact, duly authorized to locate the scrip for them. . . . As this relation was to end upon such location, we can conceive of no reason why Myrick was not at liberty, either before or after the location was made, to enter into an agreement to secure the title (enuring from the location) to the plaintiff upon payment of an agreed consideration. Such an agreement did not, so far as this case shows, tend to produce a conflict between Myrick's private interest and his duty to *locate* the scrip to the best advantage of his principals."

These defenses were reviewed by this court, and, commenting on them, it was said by Mr. Justice Clifford:

"Attempt it seems was made in the argument of the case in the Supreme Court of the State to show that the terms of the agreement were in conflict with the provisions of the act of Congress; but the answer which that court made to the proposition, though brief, is satisfactory and decisive."

And further:

"Holders of such certificates or scrip were forbidden to transfer the same, and the defendants contended that the real object of the agreement was to effect a transfer of the same; but the State Supreme Court overruled the defense, and referred to one of their former decisions, assigning the reasons for their conclusion that the defense was not well founded. (*Gilbert et al.* v. *Thompson*, 14 Minn. 544.)

"Since the case was submitted, the opinion of the court in the case has been carefully examined, and the court here concurs with the State court that the case is applicable to the present case, and that the reasons given for the conclusion are satisfactory and conclusive. For these reasons the court is of the opinion that the Federal questions involved in the record as set forth in the assignment of errors were decided correctly by the State Supreme Court."

Secretary Vilas, in passing on the validity of the location in the present litigation, in effect disagreed with the decision in *Gilbert* v. *Thompson*, and expressed the view that "all the documents, *besides* any parol additions [the italics are ours], are to be taken together to ascertain what in effect the agreement was, and it will be judged according to its nature as so ascertained;" and applying this rule, he considered that the transaction between Stram and Eaton was tantamount to a direct sale and transfer of the scrip, accompanied by the declaration that "to circumvent the statu-

tory prohibition" two letters of attorney have been executed in blank, the one to locate the scrip and the other to convey the land when the scrip shall be located, and an agreement that by whomsoever the letters of attorney may be executed no claim will be made by the Indian to the scrip or land. And he concluded that if letters of attorney accompanying such a document would be invalid, the powers of attorney to Eaton and Merrill constituted "a part of a transaction which cannot be supported in law." Secretary Noble considered the case more at length, and said: "The controlling points in the case, as decided by the court, plainly were (1) that a simple power to sell, executed by a half-breed, such as the one there considered, would extend to lands subsequently acquired by means of scrip if within its terms; and (2) that parol proof of an intent coincident with the creation of the power to transfer the scrip, could not be received to defeat the power."

The first point was not controverted, and of the second it was said that, as a rule of evidence, it might properly be enforced in controversies between individual claimants, but that it did not apply "against the government, whose interest it is, before it parts with its title, to see that the law has been faithfully complied with."

The learned Secretary regarded *Gilbert* v. *Thompson* as turning upon a rule of evidence, and that the court did not pass upon the question which he was considering, and this, he said, was "clearly shown by their statement that 'we do not decide' whether a power to sell contained in an instrument, on its face a transfer, the power being merely incidental to the transfer, would be upheld. That is the question here—the only difference being the manner of its presentation. It properly arises here on the record; in *Gilbert* v. *Thompson* it did not, the evidence of the transfer being excluded on technical grounds, and therefore was not decided." And he observed that *Thompson* v. *Myrick* went no farther, and was "in fact ruled on *Gilbert* v. *Thompson* by the State court, and that rule was affirmed by the Supreme Court (this court) on appeal."

We did not think those cases were as confined as represented. It is very evident that the courts did not think that "parol additions" could unite and make single the documents, or, when thus united, they constituted a violation of the statute. And it is a deduction from the opinions that it was not the manner of proof but the substance of what was proved or to be proved, that was passed upon. If evidence was excluded in *Gilbert* v. *Thompson*, it was admitted and considered in *Thompson* v. *Myrick*, and in both cases the delivery of scrip and its location under letters of attorney were decided to be valid, forming in one case a good title and in the other constituting a ground for a compulsory conveyance from the half-breed. The moral and legal effect of the transfer of scrip was declared by the court in *Gilbert* v. *Thompson*. The first involved, the court

said, no "turpitude nor the breach of any legal duty, as in the case of an attempt to transfer a pre-emption right;" of the second, it was said, it would be of no effect as a transfer; that "the title to the scrip would remain in him (the half-breed), and the title to the land covered by it would vest in him (the half-breed) just as though no such attempt had been made." The power of attorney, however, was given full legal effect as authority to sell the land located. It is true the court excluded parol evidence of an intention to transfer the scrip. But why? Manifestly because the transactions did not constitute a transfer of the scrip as such, and their legal character could not be destroyed by parol proof that they were intended to be something else. In other words, the court decided that the transactions were intended as a conveyance of the land and represented that intention, and could not be shown to be a transfer of the scrip. And in *Thompson* v. *Myrick* the court observed: "We can conceive of no reason why Myrick was not at liberty, either before or after location was made, to enter into an agreement to secure the title (enuring from the location) to the plaintiff upon the payment of an agreed consideration." The reasoning and the conclusions of the Supreme Court of Minnesota were approved by this court, as we have seen.

The consideration of the location of scrip under the act of 1854 came before this court again in *Felix* v. *Patrick*, (145 U. S. 317.) It is a good complement to the other cases. It recognized, as they did, the difference between the transfer of the scrip itself and its location by or in the name of the half-breed as a means of conveying the land located upon. There are expressions in the opinion that seem to go further, but they must be considered in reference to the facts. It was said: "The device of a blank power of attorney and quitclaim deed was doubtless resorted to for the purpose of evading the provision of the act of Congress that no transfer or conveyance of the scrip issued under such act should be valid. This rendered it necessary that the scrip should be located in the name and for the benefit of the person to whom it was issued, but from the the moment the scrip was located and the title in the land vested in Sophia Felix, it became subject to her disposition precisely as any other land would be. In order, therefore, for the purchaser of this scrip from Sophia Felix to make the same available it became necessary to secure a power of attorney or a deed of the land, and as the scrip had not then been located, and the person who should locate it was unknown, the name of the grantee and the description of the land must necessarily be left in blank."

And again: "As the bill alleges that Patrick obtained possession of these instruments while still in blank, he is clearly chargeable with notice that they were intended as a device to evade the law against the assignment of scrip."

Felix was a half-breed to whom scrip had been regularly issued. It was obtained from her by some person unknown, "by wicked devices and fraudulent means;" the power of attorney omitted the name of the attorney, the number of the scrip and the description of the land. The quitclaim deed also omitted the name of the grantee and the description of the land; otherwise the instruments were in legal form. The transaction was held to be a fraud upon Felix, and Patrick was adjudged to hold the title he obtained by the location of her scrip and the deed to him, as trustee for her. The court made no question of the validity of the location. Indeed, it was necessarily assumed, and the half-breed given the benefit of it. It may be said that neither of the litigants was concerned to dispute the location or to assert the provision of the act of Congress prohibiting the transfer of the scrip. If so, that provision from the point of view of the case at bar was not in judgment, and the expression in regard to it must therefore be strictly confined to the facts and the issue which was presented.

This brings us to the consideration of the amount and kind of improvements required by the act of 1854 to be erected upon unsurveyed land. The act is not explicit. It does not define the extent or kind of improvements. It permits a location to be made upon "unoccupied land . . . upon which they (half-breeds) have respectively made improvements." Residence is not required, either initial or subsequent, temporary or continuous. The purpose of the provision of the statute would seem, therefore, necessarily to be identification, notice of appropriation, and the kind and extent of improvements only to be necessary for that. But we may concede, as held by Secretary Noble, "that the requirement of improvements must have some substantial significance," and "it is not satisfied by doing something which is a betterment of the land, but of too slight a character to mark anything more than a pretext of compliance." The improvements erected on the land in controversy satisfied the rule whether they were as, it is claimed, Secretary Vilas found, or were as the trial court found in the present case.

It is further urged that the improvements were not erected for the benefit of the Indian nor did she have "a direct connection with the land," and that those requirements are made conditions precedent to a valid location by the circulars of the land office issued in 1872 and subsequently.

1. It was decided in *Thompson* v. *Myrick*, *supra*, that a valid location could be made by an attorney in fact of the Indian, and that he could, "either before or after the location was made," enter into an agreement to secure or convey the title. That case was affirmed by this court, and the facts of the case at bar bring it within the ruling.

2. To consider the act of 1854 as requiring its beneficiaries to have "a direct connection with the land and claim the same for his personal use," would lead to great embarrassment, if not to discrimination, between the

beneficiaries. The effect of that construction was expressed by the Supreme Court of the State as follows:

"Under the law the President was authorized to do what was actually done, issue to each person entitled several pieces of scrip of different sizes or acreage. Was it expected that each of these persons should be personally connected with the several and separate improvements required to be made if all of the pieces were located on unsurveyed lands, and would have to claim the same for personal use? Surely not. This law contemplated and there were actually issued several pieces of scrip to each of a large number of minors. Babes in arms were held to be entitled and to them scrip was issued, and in many cases located before the minors reached majority, as might reasonably be expected. With these facts before us can it be held that Congress thought or intended that these minors would be required by a construction of the law to personally supervise the selection of from three to five tracts of land on which to locate their piece of scrip, or that they would have to be directly connected with each of these locations, or in case unsurveyed lands were desired they would have to claim the necessary improvements as their own?"

It is impossible to escape the force of these observations and to accept a construction of the statute which has the consequences expressed. Upon the other points discussed by counsel we do not consider it necessary to pass.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.